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ASYLUM

A PHILOSOPHICAL INQUIRY INTO THE INTERNATIONAL PROTECTION OF REFUGEES

Nanda Oudejans

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Introduction

> 'A world is precisely that in which there is room for everyone; but a genuine place, one in which things can genuinely *take place* (in this world). Otherwise, this is not a "world": it is a "globe" or a "glome", it is a "land of exile" and "a vale of tears".'
>
> (Jean Luc Nancy, *The Creation of the World. Or Globalization,* p. 42)

It is exactly 60 years ago that the United Nations convened a conference, held in Geneva from 2 to 25 July 1951, on the Convention Relating to the Status of Refugees. The Convention was approved on 28 July 1951 and entered into force on 22 April 1954. Initially, the Convention aimed to address the plight of refugees scattered throughout Europe as a consequence of the Second World War. But with ever increasing numbers of people driven out of their home countries and spreading around the world, a Protocol was adopted in 1967 that removed the geographical and time limits so as to expand the scope of the Refugee Convention. The United Nations High Commissioner for Refugees (UNHCR), which started its work on 1 January 1951, estimates that at present, 16 million refugees and asylum seekers are spread around the world. To date, 147 countries have signed either or both the 1951 Refugee Convention and its Protocol.

The Refugee Convention is the bedrock for protecting persons who are vulnerable in every aspect of their lives as they no longer enjoy any form of legal protection. This lack of protection befalls a person who flees his home country and is forced to live outside the bonds of protection that connect him to the home government. The Refugee Convention addresses this lack of protection that comes into being upon fleeing. Importantly, the Refugee Convention does not cover persons who are no longer effectively protected by their government, and who have been driven out of their homes by war and violence but who did not manage

to escape their countries in order to seek safety elsewhere. The right to leave one's own country is therefore fundamentally consequential in refugee protection.

Tackling the lack of protection, the Refugee Convention aims to restore the legal person of the refugee so as to 'assure refugees the widest possible exercise of their fundamental rights and freedoms.'[1] The Convention spells out the kind of protection refugees should receive from countries in which they take refuge, as well as other basic rights that should be afforded to them, including the right to freedom of movement and religion, the right to work and the right to education. As protection is contingent upon refugee status, the Convention provides the definitional criteria that determine which persons are in need of international protection. The Convention is therefore the primary legal standard for identifying refugees, limiting protection to persons who have a well-founded fear of persecution because of race, religion, nationality, membership in a particular social group, or political opinion.

The 1967 Protocol, which acknowledged the international dimension of the refugee question, already evidences that the Convention is not a static document, but that it is, instead, responsive to an ever-changing world in which new situations of displacement continue to occur. Indeed, ever since its adoption, a complex refugee protection regime has evolved from an on-going readjustment of the scope of those in need of international protection. The approximation of protection to the rights and needs of today's refugees took a high flight in the final decades of the Twentieth Century, when human rights law permeated into the international protection regime. In a Communication from 2000 to the Council and European Parliament on the legislative package that is to form a Common European Asylum System, the European Commission explicated: 'The sources of international protection in the Member States of the European Union are, of course, the Geneva Convention of 1951 on the Status of Refugees and the 1967 Protocol, national constitutional and legislative provisions and other international Conventions and the consequences in asylum terms of compliance with the European Human Rights Convention (ECHR - Article 3) and the Convention against Torture (Article 3 again), and in certain cases the Convention on the Rights of the Child. In some Member States administrative practices are of considerable importance in terms of the general offer of protection. The role of national court and of the European Court of Human Rights decisions are vital in developing the law relating to asylum in the Member States. Generally speaking, the presence of individual persecution (the key element of the Geneva Convention) is not in fact the sole ground on which asylum is granted in Europe, even if the Geneva Convention is the central pillar of the edifice.'[2]

Despite the wide variety of legal sources upon which, to rehearse the Commission, asylum is granted in the European Union, there is little reason to celebrate the 60th anniversary of the 1951 Refugee Convention. Tapping international human rights law in matters of asylum may, indeed, have supplemented the limited 1951 refugee definition. But the snag is that over the

[1] Preamble to the Refugee Convention, consideration 2.

[2] Communication from the Commission to the Council and the European Parliament: *Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum* (COM (2000) 755 final), p. 4.

course of this development, protection inadvertently came to be limited to the prohibition to return people to places where their lives and freedom are seriously at risk without, however, paying due attention to the rights of refugees that follow from this. James Hathaway, a leading scholar in refugee law, has pointed out that in the on-going legal and political debate on stretching the eligibility criteria, only three provisions of the Refugee Convention are taken into account, covering articles 31, 32 and 33 of the Convention.[3] These articles prohibit, respectively, penalization of a refugee's unauthorized entry into a country of asylum, expulsion and *refoulement*. Other provisions of the Convention which afford refugees rights that should at least be equivalent to the rights and freedoms of other third- country nationals, and in many cases, to those of citizens, remained more or less undebated. Hathaway explains this undressing of protection by an increasingly pitiless unwillingness of states to view refugees as permanent residents which has taken root around the asylum debate at the close of the Twentieth Century.

This lack of regard for a coherent system of rights effectively disempowers refugees to make a new beginning and build their lives anew, turning countries of 'asylum' into waiting rooms where the lives of refugees are suspended. This situation forms the starting point of my thesis.

Admittedly, in particular, non-penalization of illegal entry and *non-refoulement* are quintessential to refugee protection. Such provisions limit the right of states to select and exclude in their own interest non-nationals at their borders and bar them from access to the territory -- which is certainly a daunting limitation, with millions of people on the move for reasons other than persecution, violence and war. Non-penalization and *non-refoulement* highlight that refugee protection fundamentally differs from immigration control as they prohibit the rejection at the border of protection seekers. Both provisions thus guarantee the right to seek asylum as crystallized in article 14 of the Universal Declaration of Human Rights. Though article 14 does not specify where and how the right to seek asylum must be granted, nor entails a right of first entry into the territory of the potential host state[4], I proceed from the preliminary assumption that the actual opportunity to lodge an asylum claim is dependent upon the physical presence of the refugee at a place where the targeted host state has jurisdiction – in particular the jurisdiction to call it its territory or not in the legal sense. Indeed, there is ample support for the assumption that the refugee's physical presence enhances legal protection as a number of rights, such as the right to trial and meaningful legal assistance[5],

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[3] Cf., Hathaway, J. *The Rights of Refugees Under International Law*, New York: Cambridge University Press 2005, pp. 2, 3.

[4] Compare Noll, G., Fagerlund, J., Liebaut, F. *Study on the feasibility of processing asylum Claims outside the EU Against the background of the Common European Asylum System and the Goal of a Common Asylum Procedure*, Bruxelles: Office for Official Publications of the European Communities 2002, p. 35: '[W]e have been compelled to conclude that the content of Article 14 UDHR is not legally binding upon states. On the understanding that Article 14 UDHR is something else than just a positive formulation of Article 33 of the 1951 Refugee Convention and exceeds the normative content of the latter, there is no basis for a different conclusion. Neither a homogeneous state practice nor a corresponding *opinion juris* can be made out to support a right to access territory in order to seek asylum.'

[5] Cf., Gammeltoft-Hansen, T. & Gammeltoft-Hansen, H. 'The Right to Seek - Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU', *European Journal of Migration and Law,* vol. 10 (2008), p. 454.

presuppose the physical contact between the refugee and the potential host state.[6] Simply put, 'insofar as the asylum seeker is out of sight, the right to an asylum process is likewise out of mind.'[7]

But there is reason to doubt whether the European Commission only had in mind the right to *seek* asylum when it enumerated the legal sources on the basis of which *asylum* is granted in Europe. In this respect, the Charter of Fundamental Rights of the European Union (2000) which gained legal effect with the entry into force of the Treaty of Lisbon in 2009, is worth mentioning. Noteworthy, the wording of article 18 of the Charter which enshrines a *right to asylum*[8], suggests that asylum is not limited to the right to seek asylum. However, on the understanding that the Charter only reaffirms rather than elaborates existing rights, it has been argued that article 18, though seemingly expansive, does not refer to anything other than a procedural right to claim asylum. [9] From a legal point of view, the content of article 18 has therefore been said to be 'linguistically vague and legislatively malleable'.[10] As Goodwin-Gill and McAdam put the quandary: 'In regard to asylum … the argument for obligation fails, both on account of the vagueness of the institution and of the continuing reluctance of States formally to accept such obligation and to accord a right of asylum enforceable at the instance of the individual.'[11]

Yet the conceptual understanding of the notion of asylum should not, for that reason, be dodged. In this thesis I approach the question of asylum from a philosophical perspective. Two questions underlie this academic study. First, given what refugeeship entails, what is asylum? And second, why would we, as members of democratic polities care? The notion of a right to have rights, which Hannah Arendt was the first to invoke, manifests the interrelation between both questions. The right to have rights casts light on the plight that befalls refugees upon fleeing. Indeed, the question of asylum is to be informed by a conceptual understanding of the calamity refugees are facing. For this reason, the question of asylum is to be preceded by the question of refugeeship and urges an inquiry into the concept of the refugee. Though the right to have rights illuminates what, exactly, the refugee is claiming in claiming asylum, it is far from an easy solution to the problem. Quite the contrary, the right to have rights brings to awareness the complex relation between the refugee and the potential host state. If, in modern democracies, equality and rights are the outcome of joint political action between the members

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[6] Compare Noll *et all* 2002, p. 17: 'But access to the territory of a potential host state is a precarious good for persons in need of protection. This is true in a double sense. First access to territory, even if only in the form of border territory, means at least temporary physical security. Second, such access also enhances legal protection. A number of important protective norms of international law presuppose territorial contact for their applicability.'

[7] Gammeltoft-Hansen & Gammeltoft-Hansen (2008), p. 454.

[8] Charter of Fundamental Rights of the European Union (2000/C 364/01), article 18: 'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.'

[9] Cf. Goodwin-Gill, G., & McAdam, J. *The Refugee in International Law*, Oxford: Oxford University Press 2007, pp. 367, 368.

[10] Noll, G., 'Seeking Asylum at Embassies: A Right to Entry under International Law?', *International Journal* of Refugee Law, vol. 17 (2005), p. 548.

[11] Goodwin-Gill & McAdam 2007, p. 358.

of a polity, how can the refugee, who does not belong, claim a right to have rights? The fundamental dilemma at issue here is the unavoidable asymmetry between the refugee and the receiving polity. Neither legal formalism nor the humanity of the refugee can save him from this asymmetry. Hence the question: if a people jointly determines and unites itself around a common interest, why would it care to protect refugees?

It is no exaggeration to say that 'asylum' is a pivotal concept in refugee law, if only because the refugee first appears as an asylum seeker who claims asylum in a potential host state. Seemingly, it is a self-evident notion that appears in legal documents and is used in academic and public debates on refugee protection. But the question what asylum amounts to is not, for that reason, redundant. As already indicated above, it appears that the international community is in complete disarray about the notion of asylum. This became amply clear during a conference convened in 1977, to decide on a draft Convention on Territorial Asylum. The conference failed and the Convention was not adopted, partly because agreement on the meaning of asylum was not forthcoming. Grahl-Madsen, who participated in the drafting process, explains the abortion of the Convention by pointing out that the 'term 'asylum' has no clear or agreed meaning. However, as used in the draft conventions before us, the term 'asylum' must clearly mean something more, or something different, from both *non-refoulement* and non-extradition.'[12] Intimating that asylum is something different than a positive formulation of the prohibition of *refoulement*[13], Grahl-Madsen tacitly indicates that asylum is not exhausted by the right to seek asylum. But strikingly, what can genuinely be considered to be a key concept in refugee law, to wit, asylum, is surrounded with uncertainty and perplexities. This book attempts to clear the haziness and provide conceptual clarity on the notion of asylum.

The question of refugeeship and asylum therefore not only engages legal issues, but also, it raises more fundamental conceptual questions that take us to heart of the international refugee protection regime. Who qualifies as a refugee and who is excluded of protection on the basis of the legal definition of the refugee, is not at issue here. Instead, the question of asylum is related to the situation the Refugee Convention and other legal arrangements aim to tackle. The main concern of this thesis is therefore not with the formal grant of refugee status, but rather targets refugeeship as the concrete experience of the refugee between departure and arrival. Obviously, the legal response to the refugee question is directed by what is preconceived to constitute the plight of refugees. The relevant question in this respect is how the predicament of refugees is conceptually grasped. A preliminary answer to this question is that refugees are said to constitute a class of unprotected persons who are offered international protection until a more durable solution becomes available. Three durable solutions are generally accepted: repatriation or return to the country of origin, resettlement in a country other than the country of first asylum, and integration and naturalization in the host country. Though the Refugee Convention does, in fact, recommend states to facilitate the latter option,

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[12] Grahl-Madsen *Territorial Asylum*, Stockholm/London: Almqvist &Wiksell International 1980, p.50.

[13] The reference to non-extradition in the cited passage from Grahl-Madsen makes sense within the historical context of asylum in which the grant of asylum corresponded to the right of states to refuse to extradite a non-national at the request of a state who wanted the person concerned back for punishment.

permanent settlement has clearly fallen out of favour, while at the same time states make little effort to establish a resettlement programme to receive refugees from other parts of the world.

The predominance of repatriation and/or return bears out the stubborn presupposition that refugees belong 'there', not 'here' with us. But I surmise that the referred predominance cannot simply be explained by states' reluctance to view refugees as potential new citizens. States surely factored in the negative when it comes to matters of asylum, as they zealously watch over their sovereign right to determine in their own interest who their citizens are and who should be discarded as members. But the waning of integration is also connected, or at least so I argue, with some of the most fundamental presuppositions that shape current understanding of the refugee problem. It is my hypothesis that the very *concept* of the refugee lodges the refugee in the 'country of origin' where he naturally and properly belongs and, ultimately, should return to. I will argue that, paradoxically, the concept of the refugee holds the concept of asylum out of sight.

The preliminary answer that refugees are a class of unprotected persons is, of course, overly hasty, as it disregards how the concept of 'unprotected persons' has developed over time. To tease out the conceptual framework of the refugee protection regime I will therefore track down the historical development of the notion of 'unprotected persons', going back to the years preceding and following the adoption of the 1951 Refugee Convention. Consequently, this thesis not only focuses on the legal instruments designed to address the refugee problem. Of equal importance are the two conventions, adopted in 1954 and 1961, that tackle the issue of statelessness. The difference between refugees and stateless persons, which took hold in the years following the Second World War, has decisively shaped the understanding of the refugee dilemma. By virtue of this difference, the lack of protection the refugee is suffering is qualified as a *factual* lack. Indeed, the refugee problem came to be identified as a problem of *de facto* statelessness, sharply delineated from the problem of *de jure* statelessness which expresses that the lack of protection a stateless person is suffering is a matter of law, as no single state on earth can be attributed a responsibility to protect the person concerned.

In this book, I will argue that the distinction between *de facto* and *de jure* statelessness, around which the refugee protection regime has taken root, is at the origin of the perplexities that pertain to the notion of asylum. *De facto* statelessness misfires in identifying the refugee problem. Though it rightly captures the lack of protection the refugee is suffering, it fails to see that this lack is tantamount to the loss of a place the refugee can call his own and where he can be at home. The claim that the distinctive feature of refugeehood is the loss of an own place harks back on Hannah Arendt's trenchant insight into the refugee experience. By virtue of having lost state protection, the refugee is forced to live outside the pale of law and is therefore, Arendt argues, driven outside the common world. In a legal sense, the refugee is, strictly speaking, nowhere in this world. The claim that the refugee belongs nowhere in this world is not to be taken in a metaphorical sense. On the contrary, the argument derives from a basic insight into the spatiality of law. On the understanding that legal boundaries emplace humans and human behaviour in terms of rights and duties, I am able to argue that the distinction between *de facto* and *de jure* statelessness is not as clear-cut as is commonly believed. Without a

country of their own, both the refugee and the stateless person face the same fundamental and existential dilemma: where do they have a right to live?

Casting the plight of the refugee as the loss of an own place, which signals, again, that the refugee is absolutely nowhere in this world, enables me to illuminate what the refugee is claiming in claiming asylum. The claim to asylum is ultimately a claim to an own place. Drawing on the double meaning of asylum, which refers both to 'protection' and the 'place of protection', I will argue that if the Refugee Convention is still relevant today it is because the rights which it affords to refugee's are contingent upon the legal *emplacement* of refugees within host communities. Taking the notion of 'place' back in, asylum comes to the fore as the anticipated possibility of becoming rooted again.

Rethinking the basis of our asylum policies thus requires a careful and critical re-evaluation of the differences between refugees and stateless persons. This also raises the second question of my thesis: Why would we, as members of democratic polities, care? This question allows me to address the question what *grounds a right to asylum* at a deeper level. The different legal sources that set down criteria for protection are not at issue here. The legal and political problem of refugee protection engages a more general philosophical problem. Keeping in mind that the fundamental asymmetry between the refugee and receiving polity derives from a basic insight in modern democracies, i.e. that those who rule and those who are being ruled are the same, the relevant question in this respect is: how to understand and make sense of the sovereign right of a people to determine itself?

The question is relevant. Though refugee protection is said to constitute a humanitarian exception to the sovereign right of a state to control its borders, this does not imply that sovereign power is fettered. On the contrary, the upshot of my conceptual analysis of the refugee protection regime is that refugee protection plays on the very spatial and existential-ontological distinctions that are ingredient to sovereign self-determination. Refugee protection does not, therefore, fetter sovereign power but instead throws it into relief.

Thus, an inquiry into asylum cannot side-step the question of sovereignty. This is not to denounce refugee protection as merely an exercise in cynicism or to subject refugees to the whims of a sovereign people that may or may not decide to grant protection as it deems fit. To take a people's sovereignty seriously is not to exonerate a democratic people from taking the rights of refugees seriously. The question at issue here is how, if at all, a democratic people can respond to a claim to asylum. What, if anything, may serve as an argument to grant refugees asylum 'here'?

To answer this question, I will elaborate a theory of collective identity that aims at the self that is at issue in the sovereign right of a democratic people to determine and rule it*self*. Selfhood-in-the-plural brings sovereignty into view as a people's concern for its own existence. Paradoxically as it might appear at first glance, it is the very concern for its own being that elucidates why a democratic people cares for those who have lost everything and everyone and who, for that reason, claim asylum.

This book is an attempt to elucidate the dilemma that refugees and democracies face in facing each other and to shed a new light on the relation between them. The motto of this introduction bears out the aspirations of this academic study.

Research Approach

This is a thesis in philosophy of law. It aims to discover whether the international community adequately responds to the complex refugee problem within a philosophical perspective. Therefore it is necessary to first demonstrate that there is a reason to question the international response to the issue and, secondly, to determine whether the refugee dilemma is indeed a problem worthy of philosophical reflection. I will first identify the problem as it appears in law. Then I will demonstrate the philosophical issues this legal and political problem engages. I will articulate the refugee dilemma in terms of more general issues in legal and political philosophy. In the final analysis I will sketch how the international regime of refugee protection may profit from this philosophical inquiry into asylum. I do not intend, of course, to offer a solution to the refugee problem. The modest aim of this thesis is to open up new visions of angle that redirect the conceptual understanding of the dilemma. By offering an alternative conceptual framework wherein to articulate the refugee problem, it hopes to inspire efforts made by scholars in refugee law to improve refugee protection.

The general methodology of this book is conceptual analysis. However, to steer away from what is sometimes called the 'philosophers' disease' (caused, according to Wittgenstein, by a one-sided diet of a few simple examples) it is heavily informed by a complex set of data. To get a hold of the legal and political problems involved in refugee protection I draw upon the work of scholars in refugee law, such as Alte Grahl-Madsen, James Hathaway, Gregor Noll and Thomas Spijkerboer. The critical comments and reports from the European Council on Refugees and Exiles on asylum legislation within the European Union are an important source to sharpen the debate. As a considerable part of this thesis is devoted to analysing the difference between refugees and stateless persons, I will also draw on authors such as Nehemiah Robinson, Paul Weis and Laura van Waas who have investigated the issue of statelessness. Hence, with regard to the empirical basis of my research, I depend on the socio-political and legal fact-finding by these and similar authors, who also pointed me to the less obvious legal instruments and sources. I joined them, sometimes critically, in their efforts to analyse these data, and carried the analysis further into the direction of more pertinent philosophical issues.

To come to an understanding of the philosophical stakes involved in refugee protection I turn to the famous ninth chapter of Hannah Arendt's *The Origins of Totalitarianism*, entitled 'The Decline of the Nation-State and the End of the Rights of Man.' Arendt finished *The Origins* in the summer of 1950, a year before the Geneva Refugee Convention was adopted. However, it is doubtful whether the adoption of a legal instrument to tackle the plight of refugees eased Arendt's grave misgivings about the way the international community dealt with refugees. Her argument stands out against the historical development of the legal understanding of the international dilemma of 'unprotected persons.' Indeed, Arendt's pivotal insight into the refugee dilemma is that the denial of statelessness with respect to refugees continues the balefulness of their situation. She develops her argument against the backdrop of what she coins as the right to have rights, which is claimed at the behest of people who belong nowhere in this world. Through the looking

glass of the right to have rights, refugees and stateless persons share in the same dilemma: where do they have a right to live?

I will argue that the right to have rights only makes sense within the context of international displacement. It acquires a practical meaning if translated, first, as the right to *seek* asylum, and, second, as the right to asylum. We come across this difference in various legal sources. The right to seek asylum is formulated as a basic human right in article 14 of the Universal Declaration on Human Rights, and, also, the absolute prohibition of *refoulement* is generally considered to back up the right to seek asylum. In its turn, the Charter of Fundamental Rights of the European Union invokes a right to asylum. The right to have rights casts light on this two-stringed use of the notion of asylum.

In order to illuminate why states would comply with international obligations to protect refugees, I develop a theory on popular sovereignty and collective identity, taking my cue from the German philosopher Martin Heidegger (1889-1976). Heidegger's oeuvre comprises texts on subjects such as the question of Being, metaphysics, human existence, technology, language and art. Apart from some unsavoury allusions to national-socialism, Heidegger did not explicitly engage in political philosophy, nor did he address legal problems. Yet Heidegger's thinking has exerted a great influence on contemporary political philosophers, in particular on Jean-Luc Nancy and Giorgio Agamben. These philosophers do not tease out Heidegger's 'political philosophy', nor do I intend to do so. Instead, I will focus on some specific aspects of his thinking, while leaving many others aside, in order to trace the political problem of sovereign self-determination and inclusion and exclusion back to its philosophical foundations.

Outline of the book

The first chapter of this book is entirely devoted to the current state of affairs in refugee protection. It describes the formal elements of refugee law in order to bring into sight which persons are covered by the international protection regime, and which situations fall beyond its reach. The stretching of the eligibility criteria, which is reflected in EU law by a subsidiary status for 'persons otherwise in need of international protection', may not, however, hide from view that refugee protection is waning. In order to get an empirical purchase on the downfall of protection, I will discuss the repercussions of the problem of irregular immigration with which states are struggling today on the refugee protection regime. Refugee protection has suffered a tremendous set- back, as the emphasis shifted from protection to immigration control. Under the pretext of combating and containing 'illegal' immigration, states have resorted to the means of immigration control in order to prevent the unauthorized entry of asylum seekers and/or prevent the illegal stay of rejected asylum seekers. The corollary thereof is that refugee protection more and more translates as an issue of immigration control.

As states have proven to be unable to adequately deal with mixed migration movements, the exploration of alternative forms of refugee protection is set high on the agenda of both politicians and academics. The first chapter ends with a discussion of current explorations of temporary regional protection as elaborated,

amongst others, by James Hathaway. Temporary regional protection is without a doubt the most challenging alternative to traditional forms of refugee protection.

Chapter Two takes the inquiry to the next stage, elaborating the concept of the refugee. It argues that temporary regional protection is not so much an alternative or a complement to traditional protection but is, rather, the ultimate consequence of the conceptual framing of the refugee question as a problem of *de facto* statelessness. Driven to the limit, *de facto* statelessness presupposes that refugees, at the end of the day, ought to be 'there', not 'here.' But as I will argue, *de facto* statelessness, by virtue of its strict opposition to *de jure* statelessness, veils the refugee's *displacement*, which I take in the strong sense as the lack of an own place. *De facto* statelessness fails to see that the refugee is no longer there nor yet here, but is instead nowhere in this world. The 'there' where the refugee supposedly belongs is no longer a self-evident and qualified somewhere (a foreign state, a different country) determined and positioned over against a here, but instead collapses into the nowhere of the camp. The refugee-camp is the absolute non-place which gives a spatial arrangement to the refugee's displacement. Indeed, I will argue that, by virtue of *de facto* statelessness, the camp is the fourth and hidden solution to the world's refugee problem. There is a disturbing tension, therefore, between the conceptual framework of the refugee protection regime and the explicit aim of the Refugee Convention which, recall, is to assure refugees the exercise of their rights and freedoms.

The binary opposition between here and there upon which the protection regime relies is, of course, a manifestation of the inside/outside divide that is constitutive for a democratic legal order. Another manifestation of the inside/outside divide is the distinction between the own and foreign. Drawing on an empirical analysis by Thomas Spijkerboer of the Dutch asylum procedure and the way decisions on protection are taken, this chapter also argues that refugee protection is heavily reliant upon the distinction between the own and foreign.

That refugee protection plays on the here and there, the own and foreign, sets the stage for further inquiry. Both distinctions are, as said, manifestations of the inside/outside divide that is constitutive of sovereign self-determination. In order to rethink the basis of our asylum policies we should therefore proceed from a careful consideration of popular sovereignty and modern democracy.

Chapter Three embarks upon the inquiry into popular sovereignty. To gain full understanding of the dilemma refugees and democracies face in facing each other, I will start with a discussion of the right to have rights which Hannah Arendt invokes in her reflection on the refugee problem Europe was facing as a consequence of the great wars that ravaged Europe at the beginning of the Twentieth Century. The right to have rights reflects the plight of refugees as it is the right of those who have been driven out of their countries and who belong absolutely nowhere in this world. The right to have rights is a claim at the behest of refugees to belong to a political community willing and able to grant them rights. However, the right to have rights is not an easy solution to the problem. Rather, it reflects the quandary that refugees and democracies face. If, in modern democracies, rights are the outcome of our joint political action, how are we able to respond to a right claimed by those who do not belong to us? The right to have rights signals the lack of political reciprocity between refugees and the polities in

which they claim asylum, highlighting, that is, the fundamental and unavoidable asymmetry between them. Absent this political reciprocity, why would a polity care?

I will discuss two theories that chase down the answer to this question. Seyla Benhabib teases out a moral common ground between the refugee and a receiving polity and invokes a *moral* reciprocity between them on the basis of which asylum is to be granted. However, I will argue that in matters of asylum, recourse to moral universalism is inconclusive. I will explore *proximity*, as Bonnie Honig elaborates, as an alternative to moral reciprocity. Though I am surely sympathetic to Honig's agonistic politics, she does not fully capture the challenge inherent in a claim to asylum, nor explain why this claim would register in a polity.

In Chapter Four, I will argue that the challenge inherent in a claim to asylum is the experience of a polity's own not-being. This experience, which, ultimately, is the experience of finitude, makes sense if we take into account what it means for a people to exist as a self. As will be argued, to exist as a self means to be concerned for one's own being. Indeed, I will cast sovereignty as the people's concern for its own being, its own existence. And I will try to make sense of this concern by way of rereading Heidegger's exposition of selfhood from the perspective of the first-person plural. That is, I will try to make Heidegger's understanding of human being as *Dasein*, which he expounds in *Sein und Zeit*, relevant for *plural* human being. Chapter Four thus offers an ontology of collective selfhood.

In Chapter Five, I will tease out the consequences of this ontology of selfhood for the concepts of popular sovereignty, on the one hand, and asylum, on the other. Specifically, I will rethink the sovereign right of a people to determine itself, and the concomitant right to select and exclude non-nationals, from the viewpoint of selfhood, concern and finitude. I will then return to the central problem of this book: refugee protection and how to make sense of it. First, I will argue that, on account of its concern and its own finite existence, a democratic people is able to grant refugees a right to *seek* asylum. Secondly, concern and finitude serve as an argument, from a first-person plural perspective, to grant refugees asylum 'here, among ourselves'. Discussing the first deployment of a Rapid Border Intervention Team under the coordination of Frontex at the Greece-Turkey land border in the fall of 2010, I will argue that if a democratic polity responds to refugees with indifference, distrust, hostility and violence, it fails its own fragile and finite existence as a democratic people. Finally, I will make a case to include refugees into the ambit of the EU Directive on Long Term Residents from which they are presently excluded.

1

The International Protection of Refugees

The arrival of refugees into a community has always posed questions and has always been experienced as challenging. This seems particularly true for a newly founded community that still experiences the vulnerability and democratic fragility of its own recent constitution. Indeed, the unexpected and unauthorized arrival of refugees constitutes one of the major challenges Europe is facing today. Constituted as an Area of Freedom, Security and Justice, the European Community now has to decide how to respond to the unauthorized border crossing of persons potentially in need of international protection, against the backdrop of its own legitimate interest to strengthen its borders so as to enhance the free movement of EU citizens and offer them a high level of protection.[1]

Framed as a security issue, it is no exaggeration to say that Europe faces the challenge of irregular immigration and is experiencing an asylum crisis. There is disagreement, however, as to what the problem refers and who its victims are. Those on the lookout for refugee rights would certainly argue that the crisis is constituted by the downfall of protection. Refugees suffer the consequences of the increasingly strident position the EU takes in matters of asylum, as EU legislative measures consolidate restrictive asylum policies of the national authorities of the EU member states. Elspeth Guild, for example, critically analyzed and assessed the impact of the constitution of the European Community upon refugee protection. She expresses a widespread feeling -- one that plays on the age-old criticism that the international refugee protection regime ultimately protects 'helpless states against the wicked refugee'[2] – when she says: 'It is difficult not to be shocked by

[1] The Area of Freedom, Security and Justice (AFSJ) was created to ensure the free movement of EU citizens and residents within the European Union and secure their rights. It covers policy areas that include immigration, asylum, police cooperation and the combat against terrorism, organized crime and human trafficking. The ASFJ derives from the Treaty of Amsterdam (1997) which in article 1 (5) states that the European Union shall 'maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.'

[2] This was expressed by one non-governmental observer to the Conference that adopted the Refugee Convention, quoted in: Hathaway, J. *The Law of Refugee Status*, Toronto: Butterworths 1991, p. 231.

the current situation.'[3] According to Guild, the EU 'constitutes a territorial integration project which is hostile to refugees.'[4]

Such an admonition would no doubt be opposed by those who, after pointing to the number of asylum applications in Europe,[5] argue that hospitality and generosity towards refugees are seriously obstructed by bogus economic claimants who impose upon the asylum system and cause it to become overstrained. The crisis does not concern real refugees deserving of protection, but instead refers to the large-scale abuse by economic immigrants who apply for asylum under false pretenses with a view to *de facto* immigration. On this account, the crisis is constituted by the disparity between state obligations to protect refugees and the interest they have in combating illegal immigration. It is against those who abuse our freedom and impose upon our hospitality that the EU external borders should be strengthened.

Amidst these storm clouds and quarrels about what constitutes the crisis and who its victims are, one thing seems to be absolutely unquestionable: The 1951 Refugee Convention continues to be considered as the central pillar of the edifice of refugee protection.[6]

Therefore, in this chapter I will briefly discuss the scope and purpose of the 1951 Refugee Convention, as well as recent developments in international protection that have arisen from the challenges the Convention has been facing. I will demonstrate that the EU's readiness to fill the protection gap resulting from the limited 1951 refugee definition has been counteracted by the fear of abuse that took hold of asylum policies in the final decades of the Twentieth Century. As the crisis is perceived to either refer to the downfall of protection or to the asylum system's liability to abuse, special attention will be given to the current exploration of Humanitarian Temporary (regional) Protection.[7] Perceived and explored as an alternative form of refugee protection, it potentially meets the objection that the 1951 Convention is no longer apt to deal with today's refugees, while at the same time acceding to the interest states take in embanking floods of illegal immigrants without selling out the refugees.

Dominant opinion has it that current failures in refugee protection are a matter of lack of observance of the 1951 Refugee Convention,[8] implying that a proper observance and implementation of the Convention would correct these failures.[9] I

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[3] Guild, E. 'The Europeanisation of Europe's Asylum Policy', *International Journal of Refugee Law*, vol. 18 (2006), p. 631.

[4] Ibid., p. 634.

[5] Of the 923,400 asylum applications in 2009, UNHCR has recorded on a global level, 359,400 asylum claims were registered in Europe. A total of 585,500 cases were adjudicated, with a 38% refugee recognition rate. UNHCR, however, does not report nationally calculated recognition rates. For the available statistics see UNHCR *Statistical Yearbook 2009*, Chapter IV, 'Asylum and refugee Status Determination.'

[6] Cf. Communication from the Commission to the Council and the European Parliament: *Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum* (COM 2000 755 final), p. 4.

[7] Cf., Hathaway 2005, p. 3.

[8] On the occasion of the 50th anniversary of the Refugee Convention, UNHCR issued a *Note on International Protection*. The Note informs us about difficulties and injustices refugees have to suffer due to a lack of observance of the Convention. It concludes by encouraging states 'to seize the opportunity of the 50th anniversary to give concerted attention to addressing the various obstacles which impede implementation in their respective countries and to take resolute measures to strengthen implementation.' (UNHCR, ExCom Reports, A/AC.96/951, 13 September 2001).

[9] Compare Harell-Bond, B. & Verdirame, G. *Rights in Exile. Janus-Faced Humanitarianism*, New York/Oxford: Berghahn Books 2005, p. xiv: 'If the Convention were correctly applied, the situations that can be found in so

will gradually take issue with this view. I will argue that failures in refugee protection are not just attributable to reluctant states who, ever since the adoption of the Refugee Convention, have tried to find ways to circumvent their responsibilities. What is at issue is much more fundamental than that. For the serious defects in refugee protection are also to be explained, or so I will argue, by the conceptual terms that frame current understanding of the refugee problem, and that subsequently direct the international legal response thereto. In the present chapter, I will discuss the formal elements of the international refugee protection regime so as to open up a point of entry for those unfamiliar with refugee law. In the next chapter, I will focus on the *concept* of the refugee and try to make explicit the conceptual presuppositions and master frames that shape dominant understanding of the refugee question.

1.1 Sources of Refugee Protection

The 1951 Geneva Convention Relating to the Status of Refugees[10] is the primary source for the legal protection of refugees. To date, 147 countries are signatories to either or both the 1951 Convention and its additional Protocol from 1967.[11] These countries have translated the content and scope of the Convention into their domestic legislations and agreed it to be the basis upon which asylum and protection decisions are to be made. The Refugee Convention provides the legal means to cope with the situation that befalls refugees as a result of persecution that made them flee their home countries. The most troublesome aspect of the situation that befalls refugees after their flight is the lack of state protection. The 1951 Convention addresses this situation by offering international protection. Indeed, by offering international protection the Convention, according to its Preamble, endeavors to 'assure refugees the widest possible exercise of their fundamental rights and freedoms'[12] until a more durable solution is available. The publicly accepted durable solutions include repatriation and/or return to the country of origin, resettlement, or integration/naturalization in the country of asylum. Though these are beyond the scope of the Refugee Convention, it does make recommendations to this effect. Until such time, however, conferral of refugee status restores legal protection and entitles one to the rights enlisted in the Convention.[13]

As the enjoyment of rights and protection is contingent upon refugee status, the Convention provides for the legal definition of the refugee and is, as such, the general and primary standard for identifying refugees. Giving a precise definition of the refugee, the Refugee Convention circumscribes the situations in which

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many countries today in which refugees are the 'worst-treated' aliens would never obtain.' Cf., also Noll, G. 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones', *European Journal of Migration and law*, vol. 5 (2003), p. 341.

[10] Hereafter alternately referred to as Refugee Convention, or 1951 Convention.

[11] The 1967 Protocol removed the geographical and temporal limitations to the 1951 Convention which initially limited itself to European refugees whose flight or displacement was caused by events that occurred before 1951.

[12] Preamble to the 1951 Refugee Convention, recital 2.

[13] For a comprehensive analysis of refugee rights see Hathaway 2005.

protection is required and which situations fall beyond its reach. The predicament that befalls a refugee as a consequence of his fear-motivated flight is reflected in the refugee definition. Article 1 (A) of the Convention defines a refugee as a person who, 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country.' The eligibility criteria the Refugee Convention provides are, of course, subjected to ongoing political debate, legal interpretation and contestation.[14] But for the purpose of showing the need for opening up and tapping other legal sources for protection, as the classic definition no longer covers some of the most persistent situations in which protection is required, it suffices to focus on some specific features.

A key element in the refugee definition is alienation. That is, a person has to be outside his or her country of nationality or habitual residence in order to qualify for protection on the basis of the Refugee Convention. Indeed, alienation is inherent in refugeehood, given the fact that the Convention addresses the lack of protection the individual is suffering as a consequence of his flight.[15] Yet it is this element of alienation that has been criticized as highly unjust, as it withholds protection to large numbers of persons who suffer from refugee-related violence, internal or international conflict, and massive human rights violations, and who do not manage to cross international borders.[16] Importantly, protection against these forms of violence precipitated UNHCR's understanding of the meaning of persecution that it laid down its *Handbook on Procedures and Criteria for Determining Refugee Status* (1979): 'From Article 33 of the Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion, or membership of a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution.'[17] Though UNHCR's *Handbook* is clearly limited to the rules determining refugee status, the elaboration on the notion of 'persecution' no doubt

[14] For a comprehensive analysis of the refugee definition see: Hathaway, J. *The Law of Refugee Status*, Toronto: Butterworths 1991; Goodwin-Gill, G. *The Refugee in International Law*, Oxford: Oxford University Press 1998; Spijkerboer, T.S. & Vermeulen, B.P., *Vluchtelingenrecht*, Nijmegen: Ars Aequi Libri 2005.

[15] The criterion of alienation in particular made sense in the historical context of international aliens law, which was based on the principle of reciprocity between states to treat each other's nationals with equality and fairness. As the refugee could not be afforded protection on the basis of international law, he appeared as an unprotected alien without a well-defined legal status and was considered to be an anomaly in international law. Cf., Hathaway 1991, p. 4: 'Only persons applying from outside their country of origin were eligible for refugee recognition. This is consistent with the notion of the refugee as an international anomaly: While the unprotected individual remained within the boundaries of her home state, there was no question of another country being confronted with a person outside the bounds of international accountability and, accordingly, no need to include her within the scope of League of Nations protection.'

[16] Andrew Shacknove has developed a conceptual argument with regard to the waning of alienation. Compare Shacknove, A. 'Who is a Refugee', *Ethics,* vol. 95 (1995), p. 283: 'Conceptually, however, refugeehood is unrelated to migration. It is exclusively a political relation between the citizen and the state, not a territorial relation between a countryman and his homeland. Refugeehood is one form of unprotected statelessness. Under normal conditions, state protection appends to the citizen, following him in foreign jurisdictions. For the refugee, state protection of basic needs is absent, even at home. Alienage should be considered one manifestation of a broader phenomenon: the access of the international community to persons deprived of their basic needs. Thus, what is essential for refugee status, distinguishing refugees from all other similarly deprived persons, is either the willingness of the home state to allow them access to international assistance or its inability to prevent such aid from being administered.'

[17] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* 1979, p. 14.

launched UNHCR's willingness to play a leading role in the protection of internally displaced persons.[18] Indeed, as early as the 1970's, UNHCR has provided assistance to IDP's throughout the world.[19] Though IDP's are not refugees, their protection reflects international human rights law[20] and is based on analogous refugee law.

Assistance to IDP's mainly takes place within the context of large-scale conflict-related displacement.[21] It is, therefore, more approximate to the reality of protection needs than the 1951 Refugee Convention which allegedly focuses on the individual aspects of persecution (I return to this issue below). The OUA *Convention Governing the Specific Aspects of Refugee Problems in Africa*, adopted in1969, also much more accommodates large scale refugee movements than does the protection that has taken root around the Refugee Convention. Article 1 of the OUA Convention reiterates the 1951 refugee definition. Additionally, it holds that 'the term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.'

Both the protection of IDP's and the OUA Convention, which UNHCR incorporated within its mandate, signal that the Refugee Convention falls short of offering protection in many situations of displacement and uprootedness.

EU legislative measures also significantly contributed to the widening of the scope of those in need of international protection. Over the past few years, EU law has established subsidiary forms of protection that may be granted to persons who do not satisfy the requirements for protection under the Refugee Convention.[22] Following the EU Qualification Directive[23] I will differentiate between subsidiary protection, on the one hand, and state practice to offer temporary protection for

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[18] Cf., UNHCR Standing Committee, *UNHCR's Role in Support of an Enhanced Humanitarian Response to Situations of Internal Displacement. Policy Framework and Implementation Strategy*, (June 2007). Doc. EC/58/SC/CRP/18.

[19] Cf., Ibid., p. 4. However, it should be noted that protection of IDP's by UNHCR causes a major dilemma. Whereas UNHCR was initially ascribed the task of supervising compliance of contracting states with the 1951 Convention, UNHCR switched roles as it increasingly, itself, became responsible for the protection of IDP's. Compare Hathaway 2005, pp. 995, 6: '[U]NHCR has been fundamentally transformed during the 1990's from an agency whose job was essentially to serve as a trustee or guardian of refugee rights as implemented by states, to an agency that is now primarily focused on direct service delivery ... In most big refugee crises around the world today, UNHCR is – in law or in fact – the means by which refugee protection is delivered on the ground. In seeking to exercise its traditional supervisory authority, UNHCR, therefore, faces a serious dilemma, since it is often in the position of being responsible effectively to supervise itself.'

[20] CF., UN *Guiding Principles on Internal Displacement* 1988.

[21] Article 2 of the UN *Guiding Principles on Internal Displacement* reads: 'For the purposes of these Principles, internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.'

[22] Compare Hailbronner K, 'Asylum Law in the Context of a European Migration Policy', in Walker, N. ed., *Europe's Area of Freedom, Security and Justice*, Oxford: Oxford University Press 2004, p. 62: 'Subsidiary protection is generally understood to include complementary forms of human rights and humanitarian protection that a state may grant when a person does not satisfy the requirements for refugee status under the Geneva Convention.'

[23] Council Directive (2004/83/EC of 29 April 2004), on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

humanitarian reasons, on the other.[24] The significance and implications of Temporary Humanitarian Protection will be discussed in Section 1.5.

Subsidiary protection responds to the protection gap resulting from the limited 1951 refugee definition by incorporating international human rights law - most notably the prohibition of *refoulement* as integral to the prohibition of torture – into the EU protection regime. The EU Qualification Directive thus establishes a status for persons who do not qualify for Convention-based protection but who are 'otherwise in need of international protection.' Simply put, subsidiary protection is granted to persons who are not refugees but who, nevertheless, cannot be returned to their home country under safe conditions and in a dignified manner. Council Directive 2004/83/EU, article 2 under e, understands a person eligible for subsidiary protection to mean 'a third country national or a stateless person who does not qualify as a refugee, but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15… and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.' The referred article 15 incorporates the prohibition of *refoulement*, which is the corner stone of refugee protection,[25] as an internal component of the prohibition of torture or inhuman or degrading treatment or punishment as enshrined in article 3 of the European Convention on Human Rights.[26] As the EU Qualification Directive grants subsidiary protection to persons who cannot be removed or returned home, as this would constitute a violation of the prohibition of *refoulement*, asylum law, as Spijkerboer puts it, is 'no more about just refugeehood but also about article 3, ECHR.'[27] In addition, article 15, under c defines serious harm also to include a serious and individual threat to life and freedom for reasons of indiscriminate violence in situations of international or internal armed conflict.[28]

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[24] For a discussion of granting protection on humanitarian grounds to persons who do not meet the requirements of the 1951 refugee definition see Hathaway 1991, pp. 21-27.

[25] Article 33 (1) refugee Convention states that 'No Contracting State shall expel or return (" *refouler* ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.' In its *Introductory Note* to the Refugee Convention from 2006, UNHCR stipulates: 'Certain provisions of the Convention are considered so fundamental that no reservations may be made to them. These include the definition of the term "refugee," and the so- called principle of *non-refoulement*, i.e., that no contracting state shall expel or return ("*refouler*") a refugee, against his or her will, in any manner whatsoever, to a territory where he or she fears persecution.' For an in-depth analysis of the legal grounds for the prohibition of *refoulement* see Wouters, K., *International legal standards for the protection from refoulement - a legal analysis of the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture*, Antwerpen: Intersentia 2009.

[26] Article 3, European Convention on Human Rights: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' Article 15 of the EU Qualification Directive (2004/83/EC) postulates that a person qualifies for subsidiary protection if he faces serious harm in his or her country of origin. Serious harm, according to article 15, (a) consists of 'death penalty or execution, or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin.

[27] Spijkerboer, quoted in: J. Durieux, 'Salah Sheekh is a Refugee. New Insights into Primary and Subsidiary Forms of protection', Refugee Studies Centre Working Paper no. 49, (October 2008), p. 6.

[28] Article 15 (c) (2004/83/EC): 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.'

Importantly, subsidiary protection also engendered a relaxation of the single-out criterion which allegedly inheres in the 1951 refugee definition.[29] The element of persecution, which is quintessential to the refugee definition, is generally interpreted to denote *individual* persecution[30], which is triggered by the 'subjective aspects of an individual's life, including beliefs and commitments.'[31] To satisfy the legal criteria for protection it is therefore not enough that the claimant has a subjective fear of persecution. As Goodwin-Gill and McAdams explain: '[T]he heart of the question is whether that 'subjective' fear is well-founded; whether there are sufficient facts to permit the finding that this applicant, in his or her particular circumstances, faces a serious possibility of persecution.'[32] Simply put: To qualify as a refugee it is not enough that the threat to the refugee's life, freedom and security is general, arbitrary and of a collective nature, but is instead directed at the individual person who has drawn the negative attention of the authorities, for example because of his or her activities. That is, one has to be singled-out. For example, in order to qualify as a refugee it is not sufficient to belong to a threatened minority (be it an ethnic *or* social group) whose members generally suffer from persecution. Decisive for refugee recognition is that distinguishing features regarding the individual's person exist which makes him or her an outstanding member of the threatened minority.

It is in relation to subsidiary protection that the requirement of single-out is being eased. Protection on the basis of article 15 of the EU Qualification Directive becomes illusionary, it is argued, if a claimant, in addition to the fact that he belongs to a minority, has to prove that, with regard to his person, special features exist that cause his personal risk to outstand the general risk.

The case of Salah Sheekh has been decisive in this respect. Salah Sheekh, a refugee from Somalia, belonging to the minority group of Ashraf that is part of the Reer Hamar minorities, lodged an asylum claim in the Netherlands and, in addition, claimed protection on the basis of article 3, ECHR. The Dutch authorities rejected his claim, arguing that mere membership of Reer Hamar, whose members are indeed exposed to severe violence, is not sufficient to qualify for protection. Albeit severe, the violence against Reer Hamar is general and arbitrary. The Dutch government referred to the requirement of single-out which the European Court of Human Rights had established with respect to article 3, ECHR, in *Vilvarajah vs. The UK* (1991). In *Salah Sheekh vs. The Netherlands,* the European Court of Human

[29] Kay Hailbronner expresses the view that subsidiary protection does not imply that the single-out requirement is being eased. He first questions the surplus value of article 15 (c), (2004/83/EC), arguing that the individual threat to life and freedom in situations of generalized and arbitrary violence is the same as the damage enshrined in article 15 (b). The alleged superfluity of article 15 (c) allows Hailbronner subsequently to argue that article 15 in its entirety relies on the requirement of single-out (Cf. Hailbronner 2004 pp. 63, 64).

[30] Spijkerboer contests that refugee status determination is contingent upon the requirement of single-out, arguing that the individualistic development in refugee law and practice is an incorrect application of the Refugee Convention. Looking into the drafting history of the Refugee Convention, he argues that the Convention expresses awareness of the collective nature of refugee movements and did not intend to do away with the collective refugee concept which predominated in legal instruments preceding the 1951 Refugee Convention. Cf. Spijkerboer, T. 'Full Circle? The Personal Scope of International Protection in the Geneva Convention and the Draft Directive on Qualification' in Urbano de Sousa, C. & De Bruycker, P eds., *The Emergence of a European Asylum Policy*, Brussels: Bruylant 2004, pp. 167-181.

[31] Goodwin-Gill & McAdams 2007, p. 64.

[32] Ibid., p. 64.

Rights reaffirmed, with reference to Vilvarajah, that specific facts and circumstances must exist relating to the claimant personally in order to be eligible for protection by article 3. But it also expressed the opinion that it was foreseeable that Salah Sheekh, upon return to Somalia, would be exposed to an inhumane treatment in breach of article 3. The Court, therefore, considered: 'It might render the protection offered by that provision illusory if, in addition to the fact of his belonging to the Ashraf – which the Government have not disputed – the applicant were required to show the existence of further special distinguishing features.'[33]

With respect to the relaxation of single-out, *M.Elgafaji, N. Elgafaji vs. Staatssecretaris van Justitie* (2009) is equally important. Elgafaji bestows meaning on the wording 'individual threat', showing that it is not properly understood if placed in opposition to 'collective threat.' Elgafaji and his wife, refugees from Iraq, applied for asylum in the Netherlands and claimed protection on the basis of the EU Qualification Directive article 15 (c). The Dutch Government asked the European Court of Justice for a preliminary ruling with regard to the interpretation of article 15, in particular with regard to the relation between article 15 (b) and (c). The Advocate-Generale already interpreted the meaning of 'individual threat' in the context of armed international conflict, arguing that the 'requirement serves to make apparent the fact that indiscriminate violence must be such that it cannot fail to represent a likely and serious threat to the applicant for asylum. The distinction between a high degree of individual risk and a risk which is based on individual features is of defining importance. Although a person is not covered by reason of features concerning him particularly, that person is no less individually affected when indiscriminate violence substantially increases the risk of serious harm to his life or person, in other words to his fundamental rights.' The ECJ affirmed the opinion of the Advocate-General of September 2008. It considered that 'the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterizing the armed conflict taking place … reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence in the territory of that country or region, face a real risk of being subject to the serious threat referred to in article 15(c) of the Directive.'[34]

Clearly, then, the increasing awareness that the scope of those in need of international protection by far exceeds the scope of the Refugee Convention has evoked the willingness on the part of the international community to fill the protection gap. But whereas due attention has been paid to establish anew the requirements for protection, there is no agreement yet as to the rights and substance of protection to which recognition entitles.[35] There is reason to believe,

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[33] Application no. 1948/04 *Salah Sheekh vs. The Netherlands* (2007) ECR consideration 148. In his comment on the European Court decision Spijkerboer argues that the court ruling is also relevant for the interpretation of the Refugee Convention. It would be reasonable, he argues, to consider minorities protected by article 3, ECHR to be refugees. Cf., Spijkerboer, T. 'Staatsburg en het Nederlandse vluchtelingenrecht. Bij de uitspraak Salah Sheekh tegen Nederland', *Nederlands Juristenblad* afl. 7 (2007). For a reflection on the case see Durieux 2008.

[34] Case C-465/07 ICJ (2009), consideration 35.

[35] The same is true, albeit to a different extent, with respect to other complementary forms of protection that are either based on requirements of international law (for example, international obligation relating to family unity, health, and children) or on States' discretionary policies (for example, the granting of protection for

as pointed out by Hathaway, that this is partly due to the fact that western states are increasingly unwilling to regard refugees as permanent residents, and are currently exploring alternative forms of protection.[36] Indeed, as matters stand today, subsidiary protection is inferior to Convention-based protection.[37] As Durieux puts the fundamental problem that is at stake here: 'The refugee definition is not intended to describe those whom we cannot deport, but, positively, those aliens whom we want to protect.'[38] Moreover, the question that arises is whether subsidiary protection is indeed what it claims to be, i.e., a supplement to protection offered on the basis of the Refugee Convention, and is not, in fact, replacing it. Different NGO's have expressed the concern that states, for example, may be tempted 'to use article 3 more frequently so as to avoid their broader obligations to genuine refugees under the Refugee Convention.'[39] The risk that states will assess an individual's asylum claim solely against the backdrop of article 3, ECHR, thereby skipping an assessment on the basis of the Convention, is by no means imaginary, as was also shown in the case of Salah Sheekh. The Dutch government rejected his claim solely on the basis of article 3, ECHR, not bothering to review his claim against the 1951 Convention, except for the 'minister's observation that Salah could not be a refugee since he had not made himself known as an opponent to local rulers, nor had he been politically active.'[40]

If the question whether an asylum seeker qualifies as a Convention refugee is passed over in silence, and if the rights and protection offered to persons 'otherwise in need of international protection' are qualitatively less, then we have good reasons to temper any initial enthusiasm about the broadening of the scope of persons in need of international protection.[41] For, it might well turn out that subsidiary forms of protection, instead of improving the legal position of protection seekers, contribute to a deterioration of rights and protection. This should be of our concern, since in some EU Member States, persons offered subsidiary protection already outnumber Convention refugees.[42]

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reasons of social integration). For an overview of mechanisms of complementary forms of protection in EU Member States see: European Council on Refugees and Exiles, *Complementary Protection in Europe* July 2009.

[36] Cf., Hathaway 2005, p. 3.

[37] Cf. Battjes, H. 'Subsidiary Protection and Reduced Rights', in Zwaan, K. Ed., *Qualification Directive. Central Themes, Problem Issues and practice in Selected member States* Nijmegen: Wolf Legal Publishers 2007 pp. 49-59. Also: European Council On Refugees and Exiles, *The Impact of the EU Qualification Directive on International Protection,* October 2008*;* European Council on Refugees and Exiles, *Comments on the European Commission proposal to Recast the Qualification Directive*, March 2010.

[38] Durieux 2008, p. 17.

[39] Director of International Protection, as cited in Ibid., p. 5.

[40] Ibid., p., 12.

[41] However, this concern should be weighed against a Communication of the Commission to the Council and European Parliament *Towards a Common Asylum Procedure and a uniform Status, valid throughout the Union, for persons granted asylum* (Com 2000 755 final). In this Communication, the Commission recommended that the rights and protection granted to persons whom, upon return to their country of origin, would face a real risk of serious harm, should equal the rights of the Refugee Convention. Accordingly, the Commission recommended a uniform status for both groups of persons granted international protection. I will return to this issue at length in Chapter 5.

[42] Cf., European Council on Refugees and Exiles, *Complementary/Subsidiary Forms of Protection in EU Member States: an Overview,* July 2004. Cf. also Fitzpatrick. 'Temporary Protection for Refugees. Elements of a Formalized regime', *American Journal of International Law*, vol. 94, (2000) p. 103.

1.2 Abusing the System

There is, however, another reason why any initial enthusiasm over the permeation of human rights law into the refugee protection regime should be tempered. Chances of improvement resulting from the revision of scope are thwarted, or even rendered futile, in the face of the increasingly strident position EU member states take with regard to refugee protection. Indeed, over the past few decades, increasingly restrictive admission policies came to be developed as a response to the problem of irregular immigration, causing an inappropriate intermingling of the refugee protection regime with the system of immigration control.[43] In this section, I will reconstruct how the combat of illegal immigration[44] has recoiled upon refugee law, inflicting damage upon the asylum system as a whole.

There is, of course, a close link to refugeehood and immigration, as is evidenced by the very definition of the refugee which holds that a refugee is outside his or her

[43] Though the issue of irregular immigration is beyond the scope of my research, it is important to point to another effect of the fight against 'illegal' immigration. It is a well- known fact that raising barriers for legal immigration will not diminish immigration but will instead contribute to an increase of illegal immigration. Indeed, as long as there are substantial differences in life conditions, people from poor countries will continue to make their way to the affluent West. The examples thereof are disturbing, to say the least. In her study on human trafficking in Europe, Ruth Hopkins came to the unsettling conclusion that women (mainly from Eastern European countries) will continue to voluntarily cooperate with human traffickers as long as they make more money as exploited prostitutes than they do when staying in their home countries. In long – term interviews with victims of human trafficking, Hopkins discovered that a substantial part of the women voluntarily contacted their ponces after they were deported to their countries of origin following massive round-ups of illegals in Amsterdam. (Hopkins, R. *Ik laat je nooit meer gaan. Het meisje, de vrouw, de handelaar en de agent*, Breda: De Geus, 2005). It has also been substantially documented that as long as people from the poor south choose a life in the illegal gutters of Europe over a life in poverty and inhumanity, they will continue to put their lives at risk in order to reach Europe. One of the most unsettling images of immigrants willing to risk their lives is provided in a documentary by Dominique Mollard. Mollard, a French TV-reporter, spent almost a year in Mauritania, waiting for a chance to board a fisherman's boat with other immigrants hoping to finally be able to reach the Canary Islands. His documentary shows immigrants trying and trying again to be shipped to Europe. With every attempt, they witness their fellow immigrants die at sea. But this doesn't stop them from trying again. When Mollard finally succeeds in finding a boat that will take him to the Canary Islands, he is compelled, after three days, to use his satellite phone, as the boat is running out of fuel and they are most likely to die. Some of the immigrants with whom he shared the boat, however, violently tried to prevent him calling the Spanish coastguards for rescue. Their argument: They'd rather die on the high seas than to be returned to Africa. In this respect, it is important to note that attacking the root causes of illegal immigration is part and parcel of the fight against illegal immigration. Other means deployed to that end are intervention in migration routes, fighting smuggling and trafficking networks, intensification of off-shore border controls, and so forth. Ironically, however, the main factor in contributing to illegal immigration is, as Hein de Haas has shown, the fight against illegal immigration. The net effect of all the measures that seek to prevent and contain illegal immigration is that migration routes shift, and that smuggling and trafficking networks are becoming all the more professionalized. Instead of preventing illegal immigration, the risks of immigration for the immigrants themselves become all the more severe. Cf., De Haas, H. 'The Myth of Invasion: The Inconvenient Realities of Migration from Africa to the European Union', *Third World Quarterly*, vol. 7 (2008) pp. 1305 -1322. This article is a shorter version of De Haas' Research Report for the International Migration Institute, available at his personal webpage: http://www.heindehaas.com

[44] The Commissioner for Human Rights at the Council of Europe Thomas Hammarberg has expressed his misgivings about the use of the term 'illegal immigrants' as it associates immigrants with illegal acts under criminal law. This use of language casts a negative light on immigrants and makes them suspect in the eyes of the public, including public officials. The image of the illegal 'criminal' immigrant certainly has a negative drawback on the rights of irregular immigrants. It is noteworthy that Hammarberg observes that all the EU institutions and the national authorities of Member States use the expression 'illegal immigrant.'
Hammarberg recommends the use of the more neutral term 'irregular immigrant.' Cf. Hammarberg, Th. *Criminalisation of Migration in Europe: Human Rights Implications*, Council of Europe, CommDH/IssuePaper 2010/1. If, in the pages that await us, I will nevertheless use the expression 'illegal immigrant' or 'illegal immigration' I intend to transmit the climate in which the debate on immigration and asylum takes place.

country of origin. Indeed, the right to seek asylum is dependent upon the physical presence of the asylum seeker on the territory of the receiving state, as is the subsequent protection offered in case of recognition. The right to seek asylum, therefore, relates to the issue of first-gate admission which, as Veit Bader rightly argues, is at the core of state sovereignty.[45]

However, compared to the immigrant, the potential refugee is in a different and special position[46] due to the difference in purpose of the refugee protection regime, on the one hand, and the system of immigration control, on the other.[47] Whereas the latter, broadly speaking, pertains to the control and management of the inflow of non-nationals with a view to preserving territorial, economic, political and cultural unity, the refugee protection regime, as said, addresses the loss of legal protection the refugee is suffering upon his flight. Because of this difference, it is stressed time and again that 'refugee law is not immigration law.' [48] In her philosophical exploration of the rights of immigrants to seek admission and claim membership into communities to which they do not belong, Seyla Benhabib stresses this difference in position, arguing that 'first-admission conditions for immigrants are of a different sort from those for refugees and asylum seekers. States have more discretion to stipulate conditions of entry in the case of immigration than they do when facing refugees and asylees. Their obligations to the latter group are moral and, for those states that are signatories to the Geneva Convention on the Status of Refugees … and its 1967 Protocol, they are legal.'[49]

Indeed, with respect to the first-gate admission of refugees, two things should be kept in mind. As said in the previous section, the absolute prohibition of *refoulement* is a key element in refugee protection and derives from article 33 (1) of the refugee Convention: 'No Contracting State shall expel or return (" *refouler* ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.' The wording suggests that the prohibition of *refoulement* only relates to recognized refugees. Importantly, however, both refugees and asylum seekers are protected by the prohibition of

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[45] Cf., Bader, V. 'The Ethics of Immigration', *Constellations*, vol. 12 (2003), p. 332.

[46] The EU Return Directive considers that asylum seekers are not to be considered as illegal immigrants until a negative decision on their asylum claim is made (EU Directive 2008/115/EC, consideration 9).

[47] Moreno Lax explains the difference between the refugee protection regime and the regime of immigration control on the basis of the specific humanitarian aim of the Refugee Convention as enshrined in its preamble. She argues that it should be taken into account that the refugee problem is explicitly qualified as a humanitarian problem, comparing it to another humanitarian Convention, to wit the genocide Convention. With regard to the latter, the International Court of Justice ruled that 'the Convention was manifestly adopted for a purely humanitarian and civilizing purpose', and that therefore 'in such a Convention, the contracting states do not have interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those higher purposes which are the *raison d'être* of the Convention.' Moreno Lax argues that the same can be said to hold for the Refugee Convention, the purpose of which being the humanitarian protection of refugees. As such, the difference between refugees and immigrants should be taken into account. Cf., Moreno Lax, V. 'Must EU Borders have Doors for refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with the EU Member States' Obligations to Provide International Protection for Refugees', *European Journal of Migration and Law,* vol. 10 (2008) p. 321.

[48] Hathaway 2005, p. 5. Cf., also: Brochmann, G. 'Controlling Immigration in Europe', in Brochmann, G. & Hammar, T. eds., *Mechanisms of Immigration Control. A Comparative Analysis of European Regulation Policies*, Oxford/New York: Berg 1999 p. 312.

[49] Benhabib, S. *The Rights of Others. Aliens, Residents and Citizens,* Cambridge: Cambridge University Press 2004, p. 137.

refoulement, as the prohibition not only relates to the expulsion or removal of refugees from the territory of the host state, but also contains the prohibition to reject potential refugees at the border of a state which would bar them from access to the asylum procedure. Indeed, the very wording of *refoulement* was chosen by the drafters of the Refugee Convention to include the prohibition of rejection at the borders of a state. As Moreno Lax explains: 'Certainly, already when discussing the Draft Convention, the representatives of the Secretariat explained that the practice known as *refoulement* in France did not exist in the English language. In Belgium and France, however, there was a definite distinction between expulsion, which could only be carried out in pursuance of a decision of a judicial authority, and *refoulement*, which meant either deportation as a police measure or non-admittance at the frontier.' Agreeing that the purpose of the Convention would be frustrated in the case that rejection at the border could occur to genuine refugees, it was finally decided to retain the wider French notions of '*refoulement*', instead of that of return alone.'[50] Clearly, then, the prohibition of *refoulement* guarantees the very right to seek asylum as enshrined in article 14 of the Universal Declaration of Human Rights. Hence, Lax argues that 'despite claims advancing that nothing in the Convention can be interpreted as an obligation to admit asylum seekers', the principle of *non-refoulement* appears to compromise not only a defence against expulsion, but also a right of non-rejection at the border.'[51]

The special position of potential refugees in comparison with other immigrants further becomes clear in relation to the issue of unauthorized entry. Article 31 (1) of the Refugee Convention stipulates that refugees shall not be penalized for their illegal entry if they are able to show good cause for their illegal entry.[52] James Hathaway holds that the simple fact of being a refugee constitutes in itself a good cause. Drawing on the drafting history of the Refugee Convention he argues: 'Clearly, "[t]he fact that a refugee was fleeing from persecution was [in and of itself] good cause", as refugees seeking to escape the risk of persecution cannot be expected to satisfy immigration formalities before fleeing to safety.'[53] Hathaway goes on to show that good cause for illegal entry is not limited to fleeing from persecution, but also includes the fear of rejection at the border of the receiving state.

As refugees are not expected or required to fulfill immigration requirements, refugee law is generally considered to constitute a humanitarian exception to the sovereign right to select and exclude non-nationals at the borders of a state.[54] Generally speaking, refugee law balances the rights and interests of those in need of international protection and the right of states to determine in their own interest

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[50] Moreno Lax (2008) p. 330.
[51] Ibid., p. 333.
[52] Refugee Convention article 31 (1): 'The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.'
[53] Hathaway 2005, p. 393.
[54] Cf. Hathaway 1991, p. 4. However, Goodwin-Gill and McAdam argue: 'The refugee in international law occupies a legal space characterized, on the one hand, by the principle of State sovereignty and the related principles of territorial supremacy and self-preservation; and, on the other hand, by competing humanitarian principles deriving from general international law (including the purposes and principles of the United nations) and from treaty.' (Goodwin-Gill & McAdam 2007, p. 1).

who is to be included and excluded. According to Hathaway, refugee law is 'a politically pragmatic means of reconciling the generalized commitment of states to self-interested control over immigration to the reality of coerced migration.'[55] Casting refugee law as a politically pragmatic means already foreshadows challenges to the protection regime in times of an increased pressure of irregular immigration. Indeed, in a co-authored article with Neve published six years after *The Law of Refugee Status*, the authors argue: 'Refugee law has fallen out of favor because its mechanisms no longer achieve its fundamental purpose of balancing the rights of involuntary migrants and those of the states to which refugees flee.'[56]

To get an empirical purchase on the problem at issue here, I will first consider the point at which the two systems of immigration control and refugee protection meet, which enables me to detail why the issue of irregular immigration backfires on asylum seekers and refugees.

Notwithstanding the fundamental differences between immigration control and the asylum system, the two regimes meet, as Gregor Noll stresses,[57] when the return of a rejected asylum seeker is at issue. If a claim to protection is dismissed and the asylum seeker has exhausted all possible legal means, he or she is placed back on the immigration track, as return to the country of origin or another third safe country[58] is required. To the extent that the asylum procedure, at the end of the day, only knows of two possible outcomes, i.e., recognition of a protection need or rejection, it is only fair to assume that the effectiveness and credibility of the asylum system is contingent upon the return of rejected asylum seekers. In the absence of effective return policies, the integrity of the refugee protection regime would be damaged as a whole.

However, it soon became clear that return of rejected asylum seekers was, more often than not, hindered by a lack of proper documentation on the part of the asylum seeker, which made it well-nigh impossible to determine the country of origin or persuade that country to take its national back.[59] In order to address

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[55] Ibid., p. 231.

[56] Hathaway, J. & Neve, A. 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection', *Harvard Human Rights Journal,* vol. 10 (1997), p. 116.

[57] Cf. Noll, G. 'Rejected Asylum Seekers: the Problem of Return', *New Issues in Refugee Research,* working paper no. 4, May 2009, pp. 7, 8.

[58] The EU Directive (2008/115/EC) on the common standards and procedures in Member States for returning illegally staying third-country nationals, specifies in article 3 that return is the process of a third-country national going back – whether in voluntary compliance with an obligation to return, or enforced to his own country, a transit country, or another third country to which the third- country national voluntary decides to return.

[59] It is important to note that in numerous cases, return is impossible because of a misidentification of the country of origin on the part of immigration authorities. Contributing to this misidentification is the use of language assessment tests to determine the country of origin. As Jan Blommaert has demonstrated, these language assessment tests play on the false assumption of a direct link between 'language' and 'country of origin.' Additionally, these tests only assess whether a claimant correctly uses the official language of the country to which he or she claims to be a national, and fail to take into account the claimant's speech and repertoire that have evolved throughout the life history of the asylum seeker. If the asylum seeker does not speak the official language, even though he or she has good reasons for this (the claimant, for example, didn't participate in the educational system of the country, has lived in different areas of the country, or lived in border areas, or his family history shows a long track of immigration, and so on), this is generally taken to indicate that the asylum seeker is lying about his or her country of origin. The language assessment tests subsequently determine the supposed country of origin, even if the asylum seeker is not in full possession of the national language of the said country (Cf. Blommaert, J. 'Language, Asylum, and the National Order',

problems relating to nationality, identity and documentation, states resorted to the means of immigration control with the aim of managing (and preventing) the illegal entry of asylum seekers. The intersection between the asylum and immigration system at the end of an asylum track was thus shifted towards the beginning of it. From then on, a disturbing and unsavory chain of assumptions and perceptions piled up, and the logic of abuse took hold.

The legitimate concern for effective return policies soon came to be expressed in the grim tone that failure to return would make the asylum system liable to a large-scale abuse by economic immigrants using the asylum procedure as a backdoor route towards *de facto* immigration.[60] Indeed, the asylum system (together with family reunification) was one of the ways to legally enter Europe after the closing of the legal doors for economic and labor migration in the 1990's.[61] In order to prevent this allegedly large-scale abuse so as to stem the flow of irregular immigration, return became the center of state concern. In its *Green Paper on the Common European Asylum System* (2007), the European Commission underlined the necessity to 'provide national asylum administrations with adequate tools, enabling them to efficiently manage asylum flows and effectively prevent fraud and abuse, thereby preserving the integrity and credibility of the asylum system.'[62] Three years earlier, the Dutch Government in its *Memoranda on Return* already expressed the view that return no longer constitutes the keystone of the asylum procedure, but should be considered to be an integral part thereof. Consequently, the memoranda recommends that the immigration authorities notify the asylum seeker at the start of his procedure that return is most likely to be the expected outcome.[63] The emphasis on return clearly plays on the assumption of a wide abuse of the asylum procedure, assuming, therefore, that most asylum claims will be unfounded. As Guild observes: '[I]n most Member States, overall recognition rates declined. With this trend, the arguments in favor of inclusive asylum policies suffered a setback. A new logic took hold: if most asylum seekers do not deserve refugee status, then they should be kept out of the territory. The duty of protection loses its force as fewer and fewer persons claiming it are determined to be entitled. The logic of preventing abuse takes hold.'[64]

The focus on the abuse of the asylum system not only misfires at the issue of irregular immigration, as the majority of irregular immigrants do not lodge a fraudulent asylum claim to enter the EU through the legal gates, but also it is simply false to assume that the majority of asylum seekers are malafide claimants, as if there are no refugees in today's world. Anyone who is not feeble-minded would normally be suspicious of the concoctions of a megalomaniacal mind like Mu´ammar al-Gadaffi, who said that the issue of asylum seekers 'is a widespread lie.' Yet his statement is at the apex of the logic of abuse that predominates the

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Current Anthropology, vol. 50 (2009), pp. 415-441) I will discuss Blommaert's article in more detail in Chapter Two.

[60] Compare Hailbronner, K. (2004), p. 41: 'In spite of smaller numbers since 2000, asylum law has continued to provide a backdoor for illegal immigration into the European Union.'

[61] Cf., Brochmann, G. 'The Mechanisms of Control', in Brochmann & Hammar eds, *Mechanisms of Immigration Control. A Comparative Analysis of European Regulation Policies*, Oxford/New York: Berg (1999), p. 2.

[62] As quoted in Morono Lax (2008), p. 316.

[63] Cf. Directoraat-generaal Internationale aangelegenheden en vreemdelingenzaken, *Terugkeer Nota. Maatregelen voor een effectieve uitvoering van het terugkeerbeleid*/29344, no. 1, 21 november 2003, p. 6.

[64] Guild (2006), p. 639.

discussion on asylum. Upon his visit to Italy in June 2009, in the context of the 'Friendship Pact',[65] Gadaffi stated that Africans are 'living in the desert, in the forests, having no identity at all, let alone a political identity. They feel that the North has all the wealth, the money, and so they try to reach it … Millions of people are attracted by Europe, and are trying to get there. Do we really think that millions of people are asylum seekers? It is really a laughable matter.'[66] I am not suggesting that all 'boat people', as they are called, are refugees, but it is also too bold a claim to say that none of them is.[67] But even though Gaddafi is generally considered to be a megalomaniacal dictator, the fact is that the European Commission signed a cooperation agreement with Libya in October, 2009, which included 50 million euro's for border management despite the forced closure of UNHCR's office in Tripoli.[68]

So the asylum procedure is no longer only perceived as a key element in refugee protection but it is also, and above all, perceived as a 'trump card on the usual rules of immigration control.'[69] The problem at issue here is, of course, that states cannot decide beforehand who is a real refugee deserving of protection, and who is merely a bogus claimant imposing upon the system. And once that decision is made, it is already too late, so to speak, because of the bogus claimant's physical presence upon a state's territory. As it turns out, refugee law has not only fallen out of favor, as it fails to take into account the interests states have in managing immigration, but also it is incriminated for enabling irregular immigration. This incrimination fuelled the logic of abuse and is the driving force behind current restrictive, or as some even say non-admission, policies for refugees[70] that cause them to get caught in the deadlock of immigration control. As Grete Brochmann puts it: 'Whereas refugee policy in principle belongs in the realm of human rights, it turned out to be a border control issue where the … right for refugees to seek protection was discarded.'[71] Indeed, as will be shown below, subjecting asylum seekers to the means of immigration control so as to prevent their illegal entrance in the broader context of the fight against illegal immigration, seriously endangers the very right to seek asylum.

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[65] On August 30, 2008, Italy and Libya signed 'The Treaty of Friendship, Partnership and Cooperation between the Italian republic and the Great Socialist People's Libyan Arab Jamahiriya.'

[66] Mu´ammar al-Gadaffi as cited in: Human Rights Watch, *Pushed Back, Pushed Around. Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, September 2009, p. 10.

[67] Cf., Ibid., pp. 11, 12.

[68] Cf., Human Rights Watch, *World Report 2011*, p. 423.

[69] Hathaway, J. 'Preface: Can International Refugee Law be Made Relevant Again?', in Hathaway, J. ed., *Reconceiving International Refugee Law*, The Hague: Nijhoff 1997, p. xix.

[70] Compare Kostakopoulou, D. & Thomas, R. 'Unweaving the Threads: Territoriality, National Ownership of Land and Asylum Policy', *European Journal of Migration*, vol. 6 (2004) pp. 12, 13: 'In the 1980s, the anti-immigration discourse shifted towards refugees: Refugees were portrayed as 'bogus asylum seekers', 'economic migrants' and 'abusers of the asylum system.' The imposition of visa requirements on people coming from countries from which many were likely to flee, and the 'privatization' of immigration control via carriers' liability legislation, were strategies designed to clamp down on refugees. Detention of asylum seekers either in detention centres or in prisons, owing to a lack of space in detention centres, was added to the menu of exclusionist policies designed to deter the entry of 'unwanted foreigners.' Cf. also Huysmans, J. 'The European Union and the Securitization of Migration', *Journal of Common Market Studies*, vol. 38, (2000), p. 753. In general, see: Brochmann, G. & Hammar, T. (Eds.). *Mechanisms of Immigration Control. A Comparative Analysis of European Regulation Policies* Oxford/New York: Berg (1999). And Guild, E. 'Seeking Asylum: Storm Clouds Between International Commitments and EU Legislative Measure', *European Law Review*, vol. 29 (2004), pp. 198-218.

[71] Brochmann, G. (1999), p. 312.

1.3 Internal and External Immigration Control

Aware of the fact that borders alone will not stop people from crossing them, the means of immigration control aim at different points of the immigration track, ranging from the country of origin via transit countries, to the eventual arrival in the receiving state. Indeed, immigration control is rapidly moving away from the geographical border[72] and can generally be divided into internal and external control as suggested by Brochmann and Hammar.[73] External and internal means are based on so-called push and pull factors, that are meticulously mapped, that cause people to leave or flee from their own country and attract them to others.

External control seeks to control, prevent and contain immigration before departure (if it intervenes in countries of origin) or arrival (if it focuses on transit countries). If we limit ourselves to mechanisms of external control relevant to refugee movements, the first thing to be noticed is a strategy of prevention. As Brochmann discerns: 'There is an assumption present that economic development also fosters the generation of democratic institutions, and that development will therefore eventually contain the need to flee.'[74] A case in point is the new vision on human rights presented by the Dutch Government in its paper *Naar een menswaardig bestaan* (2007). The Dutch Government expresses the view that a pro-active human rights strategy needs to be incorporated in its foreign policy, assuming that enabling and supporting a worldwide observance of human rights also serves its own national interests. Preventing and containing refugee movements appears to be a recurring interest. Aware of the fact that so-called failing states cause large numbers of people to flee, the Dutch Government commits itself to the observance of the 'responsibility to protect' that states have *vis-a-vis* their nationals, even promising if possible to intervene if states fail this responsibility.[75] Remarkably enough, the government's new human rights strategy holds that *human rights pertain to the relationship between a state and its nationals.* Indeed, this clearly limits other states to an observance of this responsibility to protect, at times perhaps pursuing to enforce this responsibility. The assumption that an individual is supposed to enjoy his or her human rights in the country of origin is once again affirmed by the striking absence of any reference to the right to seek asylum. Despite the fact that the Dutch Government holds human rights to be indivisible which implies that the lack of concern for one human right is detrimental to all human rights, article 14 of the Universal Declaration of Human Rights[76] is passed over in silence. Instead, the Dutch Government appears to have substituted the 'right to stay' for the right to seek asylum. The position of the Dutch Government echoes the much debated UK's *A New Vision for Refugees* (2003) in which the UK government empathically depicts a new perspective on refugee protection:[77] 'If we are seeking to imagine the

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[72] Cf. Van Houtum, H. 'The Geopolitics of Borders and Boundaries', *Geopolitics*, vol. 10 (2005), pp. 672-679.
[73] Brochmann & Hammar 1999.
[74] Brochmann 1999, p. 305.
[75] The UK also opts for humanitarian and/or military intervention in order to prevent refugee flows. For a discussion of this proposal see: Van Troost, L., 'Gewapende interventie en 'regime change': Onwezenlijke gedachten of wezenlijke onderdelen van plan Blair?' in Bruin, R. & Teitler, J. Eds, *Niemandsland. Opvang van vluchtelingen in de regio,* Amsterdam: Amnesty International 2003, pp. 179-190.
[76] Universal Declaration of Human Rights, article 14 (1): 'Everyone has the right to seek and to enjoy in other countries asylum from persecution.'
[77] For a discussion of the UK's proposal and its legal ramification see: Noll (2003), pp. 303-341.

best possible regime for refugees then we should be ambitious. In this visionary world there would be no refugees. No-one would be living in fear of persecution and there would be no abuse of human rights. Everyone would be adequately protected by his or her own state. This may sound like a utopia but it is the only full solution to the refugee problem.'[78] Hathaway and Neve point out that at the close of the Twentieth Century, UNHCR also promoted a right to stay or remain: 'As the right of refugees to access secure and dignified asylum fell out of favor in both the North and South, states prevailed upon intergovernmental institutions to devise a less intrusive alternative to the duty to receive refugees.' UNHCR responded by proclaiming a 'right to remain.'[79] This leaves one to wonder, however, what remains of the repeated mantra that human rights apply 'to everyone, at all times and *everywhere*', as they can only be enjoyed in the state of which one is a national. As attractive as fighting the root causes of refugee flows may be in order to guarantee a right to stay, it should be remembered that the obligation to protect refugees cannot be reduced to solving the problems that causes them to flee in the first place.[80]

Imposing visa requirements also resorts under the means of immigration control. The EU visa regime determines the countries whose nationals are required to be in possession of a visa, and the countries whose nationals are exempted from this requirement.[81] The drafting of the so-called 'Black List' and 'White List' 'has developed in disconnection with refugee matters',[82] Moreno Lax argues.[83] According to the Maastricht Treaty (1992) the imposing of visa requirements is considered to be a legitimate means to cope with refugee crises.[84] The by now firmly established visa regime, imposing requirements for nationals of mainly non-OECD countries,[85] including refugee producing countries, is a flagrant disavowal of the above- mentioned difference in position between immigrants and potential refugees.

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[78] As cited in Van Troost 2003, p. 180.

[79] Hathaway & Neve (1997), p. 133.

[80] Besides, the discourse on attacking the root causes of refugee flows seems highly rhetorical and symbolic. Compare Afeef, 'The Politics of Extraterritorial Processing: Offshore Asylum Policies in Europe and the Pacific', *Refugee Studies Centre,* Oxford, Working Paper no. 36, October 2006, p. 9: 'The frequent rhetorical allusion to the 'root causes' approach, however, has not translated into extensive and concrete initiatives on the ground, and this strategy remains largely unexplored.'

[81] Cf., Van Houtum, H & Pijpers, R. 'The European Union as a Gated Community: the Two-faced Border and Immigration Regime of the EU', *Antipode*, vol. 39 (2007), pp. 291-308.

[82] Moreno Lax (2008), p. 325.

[83] Cf. also Gammeltoft-Hansen, T. & Gammeltoft-Hansen, and H. 'The Right to Seek - Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU,' *European Journal of Migration and Law,* vol. 10 (2008), pp. 439-459.

[84] Maastricht Treaty, article 100 (c): 'In the event of an emerging situation in a third country posing a threat of a sudden inflow of nationals from that country in the Community, the council may introduce visa requirements for nationals from the country in question.'

[85] Huysmans casts the current regime of immigration as a 'mediated policy of belonging'. Cf., Huysmans, J. (2000), p. 757. He further argues: 'Border controls and by implication the internal security problematic created in the EU has a cultural dimension. Although it is often suggested that external borders have been fortified for all so-called third- country nationals, this is not what has happened in practice. Border control is polysemic: Individuals crossing borders are often differentiated according to more than one criterion. The EU's external borders, for example, have been more 'real' for most non-OECD nationals than for members of OECD countries … This differentiation is confirmed in the list determining the third countries whose nationals must be in possession of a visa for entering Member States of the European Union.' (Ibid., p. 763).

Next to visa requirements,[86] carrier sanctions (i.e., penalizing transport companies for carrying undocumented immigrants) are generally considered to be 'the most effective blocking mechanisms for asylum flows.'[87] Other effective external blocking mechanisms include the principle of the safe country of origin and safe third country through which the asylum seeker has passed, which both are a justification for the invocation of the manifestly unfounded application for asylum, and exclusion of the individual from the asylum procedure. It also includes the establishment of bilateral agreements with transit countries such as previously mentioned Libya, and Morocco, where irregular immigrants are forcibly returned, and where potential refugees are not effectively protected.[88] Next to these 'passive' or 'soft' blocking mechanisms, more active (and aggressive) ones are deployed, such as the externalization of border controls, the strengthening of borders with concrete and fences, the use of technological devices (infra-red scanning, motion detectors) aiming at apprehending and intercepting immigrants on the high seas.[89]

The backwash of external immigration control is that potential refugees are seriously impeded in their right to seek asylum and have their claims assessed and reviewed.[90] If, in the previous section, it was argued that the consequences of strategies to prevent abuse are far more serious than the concerns that induced some caution with respect to subsidiary forms of protection, it is because potential refugees are seriously emasculated to seek asylum.[91] Indeed, as scholars and practitioners in refugee law have pointed out, any progressive development in refugee law remains an empty gesture in the face of restrictive or non-admission

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[86] It is important to stress that visa requirements apply to potential refugees as well as to recognized refugees. Cf. Morono Lax (2008), p. 324. Annemarie Busser relates the bizarre consequences of such a policy. In her *Gevangen tussen grenzen. Verhalen van vluchtelingen,* she collected the stories of refugees with whom she has been involved as a legal employee for Amnesty International. She relates the story of Rizgar, a refugee from Syria, whom the Dutch authorities permitted to reunite with his family, as his wife was recognized as a refugee. However, the Dutch authorities claimed to be unable to provide Rizgar with the required immigration formalities, causing him to illegally travel to the Netherlands. This took him two years, in which he was frequently detained and tortured for his illegal entry and stay in transit countries. The Dutch authorities declared that his travel to Dutch territory was his own responsibility, even though they would grant him access upon arrival and a legal resident permit. For the story of Rizgar and his wife see: Busser, A. *Gevangen tussen grenzen. Verhalen van Vluchtelingen,* Amsterdam/Antwerpen: Atlas 2005, pp. 11-36.

[87] Moreno Lax (2008), p 317. See also Brochamnn1999 p. 307.

[88] For a discussion of these agreements and the legal issues engaged see Afeef, 2006.

[89] The European Committee for the Prevention of Torture (CPT) expressed its grave concerns about the practice of intercepting immigrants on the high seas: '[T]he CPT has grave misgivings about the policy adopted by certain countries of intercepting, at sea, boats transporting irregular migrants and returning the persons concerned to North or North-West Africa. A practice with similar implications allegedly takes place at certain European land borders. Countries that implement such policies or practices could well be at risk of breaching the fundamental principle of '*non-refoulement*', a principle which forms part of international human rights law as well as of European Union law. This is particularly the case when the countries to which irregular migrants are sent have not ratified or acceded to the 1951 Geneva Convention Relating to the Status of Refugees.' (European Committee for the Prevention of Torture and Inhuman or Degrading treatment or Punishment, *20 Years of Combatting Torture, 19th general Report* 1 August 2008-31 July 2009, p. 42).

[90] I will return to this at length in Chapter Five.

[91] That the intermingling between the objectives of migration control and refugee protection should be of our grave concern, is expressed by the 2007 awarding of the Nansen refugee Award to Katrine Camilleri by UNCHR. Camilleri is a lawyer from Malta who gives legal assistance to refugees arriving at Malta. UNHCR considered that ' Dr. Camilleri and Jesuit Refugee Service are key partners in helping UNHCR fulfill its goal of assisting governments to identify refugees caught up in migratory movements and responding to their needs. See http://www.unhcr.org/news/NEWS/46ee38792.html, accessed (October 2007).

policies.[92] Caught up in immigration movements, endangered in the right to seek asylum and therefore at risk of being *refouled*, potential refugees, for whom asylum is a matter of life and death, are increasingly left destitute and unprotected.[93] Today we have good reasons to say that the credibility and integrity of the asylum system is no longer imperiled by the non-return of rejected asylum seekers, but that it is hazarded by the deflection of asylum seekers from our territories. [94]

While external instruments aim at controlling immigration before arrival or departure, internal immigration control is directed against immigrants and asylees who have to await a final decision on their (prolonged) legal stay, or who already managed to settle illegally. In order to control the latter group, with the prospect of returning or removing them, knowledge about who they are, where they are, and where they ought to be, is crucial. Though irregular immigrants would seem to defy codification and registration, there are, in fact, several sophisticated means to identify and register them. To this end, highly advanced technological devices of identification, surveillance and registration are being developed. The information they subtract is stored in several databases that are mutually connected. In the European Union, for example, the Schengen Information System (SIS) and Eurodac are currently operable, and a third database, the Visa Information System (VIS) is under construction. Advanced in line with the three possible migration histories of irregular immigrants, the databases contain information and documentation on the identity of the immigrant who illegally entered Europe (SIS), who applied for asylum (Eurodac), or requested a visa (VIS).[95] The information gathered in the latter two relates to identity and nationality and includes fingerprints and biometrical data. These databases and the networks created between them constitute, according to Broeders, the new digital borders of Europe, as they fix the digital traces of the migration histories of immigrants and asylum seekers.[96] The idea is that these digital traces equip authorities charged with tracking down irregular immigrants with the means to re-identify them. Thus, for example, Eurodac stores the fingerprints of every asylum applicant over the age of 14. If an apprehended illegal immigrant hides who he is and from where he came, his fingerprints can be entered in Eurodac.[97] If a match is made, he can be linked to an

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[92] Cf., Battjes, H. 'Het Europees Asielrecht', *Justiële Verkenningen*, afl. 6 (2004), p.90; and Hathaway 1997, p. xx.

[93] Hein de Haas estimates that the percentage of irregular immigrants who are stopped in Morocco and who are in need of international protection varies between 10 and 20 percent (Cf., De Haas (2008), p. 8.

[94] Cf., Guild, E. (2006), pp.649, 650.

[95] Cf., Broeders, D. 'The new Digital Borders of Europe. EU Databases and the Surveillance of Irregular Migrants,' *International Sociology*, vol. 22 (2007), p. 85: 'In general, irregular migrants have three possible 'migration histories.' They either crossed the border illegally (with or without help), they were asylum seekers and stayed after their claim was rejected, or they came on a legal visa and stayed after its validity expired. The network of databases develops accordingly. Irregular migration defies codification, but irregular migrants found in member states can be registered in SIS. Those who enter through asylum procedures will be registered in Eurodac, and those who enter on a legal visa will, in the future, be registered by VIS.'

[96] Cf., Broeders (2007), p. 71-92.

[97] Broeders warns against the so-called 'function creep', wherein a system oversteps the functions it was originally designed for and, as a consequence, simultaneously sidesteps the limits of the legal framework. Thus, Eurodac was originally developed as a system to support the Dublin-Convention that aimed at preventing asylum-shopping, and provided the standards to determine the country that was held to be responsible for processing the asylum claim. However, it rapidly developed as an effective tool to combat illegal immigration.

asylum dossier that contains relevant information about his identity and nationality that presumably facilitates his or her removal.

Just as external immigration control engages serious legal issues, so also does internal immigration control. Internal immigration control frequently makes use of immigration detention. As intimated already in the previous section, one of the most important tools for internal immigration control is the return or removal of irregular immigrants and rejected asylum seekers. The EU return Directive from 2008, sets down the conditions for return and/or removal, considering in its recital 4 that an effective return policy is a necessary element of well- managed migration policy. Though the Directive prefers voluntary return over forced removal (recital 10) it does set down conditions for the use of coercive measures and detention. Article 15 of the Directive stipulates that detention is only legitimate if other less coercive measures cannot be applied effectively because there is a risk of absconding, or the concerned immigrant is avoiding or hampering preparations for his or her return. Clearly, then, detention is only justified for the purpose of return and/or removal. Article 15 (4) thus states that if 'a reasonable prospect of removal no longer exists … detention ceases to be justified and the person concerned shall be released immediately.'[98] Referring to general principles of EU law, the Directive stresses that decisions taken with respect to detention should be adopted on a case-by-case basis and be based on objective criteria. This implies at the very least an individual assessment of a risk of absconding, as well as an assessment of alternative means such as regular reporting with the authorities.[99] However, different reports show that detention of irregular immigrants and rejected asylum seekers often does not meet these criteria and fails general principles of law.[100] As Kostakopoulou and Robert Thomas observe, detention, which used to be an exceptional measure of last resort, is today in favor of becoming the rule.[101]

With respect to immigration detention, two facts relating to the duration and circumstances of detention are particularly alarming. Though it is admirable that the EU Return Directive has ended the practice of indefinite detention, it is questionable, if not to say deplorable, that it provides that detention for removal may not exceed six months, giving states the opportunity, however, to extend this period with twelve months. Though the Directive emphasizes that unaccompanied minors and families may only be detained as a measure of last resort and for the

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[98] Note that the Return Directive is based on article 5 of the European Declaration on Human Rights and lays down the situations in which a person may be arrested and detained. Article 5 (1) (e) evokes 'the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country, or of a person against whom action is being taken with a view to deportation or extradition.' This forecloses the possibility to bring irregular stay within the ambit of criminal law. On April 28, 2011, the European Court of Justice in Judgment C-66/11 El Dridi ruled that Member States may not detain a person on the sole grounds of illegal stay, as this would interfere with the objectives pursued by EU law which allows for detention for the purpose of enforcing a return decision only.

[99] Cf., Raad voor Strafrechtstoepassing en jeugdbescherming, *Advies Vreemdelingenbewaring*, (June 16, 2008), pp. 20, 21. Cf. also European Council of Refugees and Exiles, *Information Note on the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*. Document CO7/2009/Ext/MDM; and Van Kalmthout, A. 'Het regiem van Vreemdelingenbewaring. De balans na 25 jaar', *Justitiële Verkenningen*, no. 4 (2007), pp. 190-201.

[100] Amnesty International, *The Netherlands: The Detention of Irregular Migrants and Asylum-Seekers,* doc. EUR (35/02/2008); Human Rights Watch, *Fleeting Refuge: The Triumph of Efficiency over protection in Dutch Asylum Policy, (*April 2003); Raad voor Strafrechtstoepassing en jeugdbescherming, *Advies Vreemdelingenbewaring*, (June 16, 2008).

[101] Cf., Kostakopoulou & Thomas (2004), p. 13.

shortest possible time, it does not foreclose the possibility of detention of up to eighteen months for children and vulnerable persons. An extensive and comparative study on the relation between detention and removal conducted by Van Kalmthout puts doubt, however, on this time limit of eighteen months. Empirical data show that effective removal is most likely to occur within three months of detention. After three months, only 20 percent of detained immigrants are removed, and after six months, the percentage is brought back to a minimum, close to nil.[102]

With respect to the material conditions, it cannot be over-emphasized that irregular immigrants and rejected asylum seekers are deprived of their liberty with a view to their removal from a state's territory, not because they are criminals. In its *General Report 2008-2009,* the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) stresses that the 'purpose of deprivation of liberty of irregular migrants is thus significantly different from that of persons held in prison either on remand or as convicted offenders.'[103] CPT, therefore, strongly argues that 'a prison establishment is by definition not a suitable place in which to hold someone who is neither accused nor convicted of a criminal offence.'[104] However, the general report also communicates that 'there are still far too many instances where CPT comes across places of deprivation of liberty for irregular migrants, and on occasion asylum seekers, which are totally unsuitable.'[105]

Indeed, it has often been observed that non-criminal aliens are treated as criminals. In fact, they are treated worse, as even basic principles of penal law are massively violated. As detention for removal involves non-criminal individuals, the principle of minimum restrictions requires that they be detained 'in centres specifically designed for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably qualified personnel.' [106] In practice, however, this principle has been abandoned.[107] Irregular immigrants and rejected asylum seekers are detained in penal institutions or in institutions that resemble a penal regime. They lack juridical safeguards, have no access to appropriate medical care, have to share their cells with two or more persons and are kept under a regime of 'restricted community' which basically means that they are locked in their cells, a measure which is otherwise exceptionally used for extremely violent convicted criminals. Moreover, they are severely restricted in their privacy, and not even granted a temporary leave of absence to join their partners when they are giving birth, or to bid farewell to a dying parent.[108]

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[102] Cf., Kalmthout, van A. *et.al. Terugkeermogelijkheden van vreemdelingen in vreemdelingenbewaring. Een onderzoek naar verhinderende, bemoeilijkende of vergemakkelijkende factoren van terugkeer van vreemdelingen in vreemdelingenbewaring. Deel 1 De vreemdelingenbewaring in Tilburg en Ter Apel.* Nijmegen: Wolf Legal Publishers 2004.

[103] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *20 Years of Combatting Torture, 19th General Report*, 1 August 2008-31 July 2009, p. 38.

[104] Ibid., p. 38.

[105] Ibid., p. 38.

[106] VU Special Rapprteur on the Rights on Non-Citizens Weisbrodt as cited in: Van Kalmthout, A.M., 'Het regiem van Vreemdelingenbewaring. De balans na 25 jaar', *Justitiële Verkenningen*, 2007, no. 4, p. 96.

[107] Cf., Van Kalmthout, A.M., *Ook de illegaal heeft een verhaal. 61 gesprekken met illegale vreemdelingen in vreemdelingenbewaring.* Wolf Legal Publishers, Nijmegen, 2006, pp. XIV, XV; See also Boone, 'Penitentiaire beginselen en de bewaring van vreemdelingen', *Proces. Tijdschrift voor strafrechtpleging, (*2003), vol. 6.

[108] Cf., Van Kalmthout, (2007), p. 98. The harsh regime of alien detention was brought to public awareness after the Schiphol fire in October, 2005. Though a burning cigarette of one of the detainees probably set the

Not only are we witness to an increase in detention for removal,[109] the number of immigrants detained upon arrival is also rising.[110] Border detention relates to the refusal of entry upon arrival if a person does not meet visa requirements or other immigration formalities. In order to prevent him or her gaining access to the territory beyond the border checkpoint (usually an airport or harbor check point) he or she can be detained. On account of article 31 of the Refugee Convention which, recall, states that refugees shall not be penalized for illegal entry, detention of asylum seekers is a highly morally sensitive issue.[111] However, Kay Hailbronner develops an argument that is to provide the basis for the detention of all asylum seekers, not just for those who are rejected.[112] He starts his argument by stating that he doesn't want to quarrel over numbers but, nevertheless, feels the urge to remind that less than ten percent of all asylum applications in the Member States of the EU are successful, implicitly suggesting that the majority of applicants are fraudulent claimants who use the asylum procedure as a backdoor route to illegal settlement. He then explicates that, traditionally, detention relates to the deportation of rejected asylum seekers, raising the question whether or not it can be considered to be a reasonable and legitimate means for all asylum seekers. Hailbronner reiterates all the relevant norms of international human rights law relating to the detention of asylum seekers. Consequently, he considers detention to be illegitimate for preventing the entry of bogus and fraudulent claimants. Such a reasoning would be suspect, as it seems to presuppose that all asylum seekers are fraudulent. But, as he rightly argues, whether an asylum seeker is a genuine refugee or a bogus claimant is something that has to be decided in the asylum procedure, and ought not to be presupposed beforehand. With reference to Article 31 of the Refugee Convention, Hailbronner then argues that detention for unauthorized entry is illegitimate, as well. Nor can asylum seekers be detained for the mere fact of applying for asylum. Hailbronner, nevertheless, goes on to find a rationale for

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fire, the fire spread as quick as lightening, as the detention center did not fulfill important requirements of safety and security. Those who managed to escape (eleven persons were killed in the fire) were forced outside and pushed together behind a fence. Despite the extremely traumatic experience of having escaped a sea of flames, and hearing and seeing people die in it, the detainees were immediately replaced to other detention centers, where they were locked up or even put in isolation cells. The former Minister of Immigration and Integration, Rita Verdonk, publicly stated the situation was adequately dealt with. The day after the fire, she phoned the wife of one of the detainees who had just given birth to say her condolences and show her compassion. It turned out that the husband wasn't killed in the fire, but could not be found, as he was put away in an isolation cell where he was prohibited to contact his wife or lawyer.

[109] In The Netherlands, for example, detention capacities have increased from 200 cells in 1984, to 3100 cells in 2007. Van Kalmthout calculated the cell capacity of aliens to be 13 to 17 percent of the total penal capacity (detention of aliens in police cells not included). At a rough estimate, 25 percent of the total prison population is made up of non-criminal aliens (Van Kalmthout, A.M. 'De politiecel als bewaarplaats voor illegalen', *Proces. Tijdschrift voor strafrechtpleging, (*2003), no. 6, pp. 294-300).

[110] Migreurop, a network of activists and researchers, has established that there are 235 camps of different kinds for the detention of foreigners. For information and maps of camp sites, see: http://www.migreurop.org/IMG/pdf/carte-en.pdf.

[111] Compare European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *20 Years of Combatting Torture, 19th General Report* (1 August 2008-31 July 2009), p. 37: 'It should be noted that asylum seekers are not irregular migrants, although the persons concerned may become so, should their asylum application be rejected and their leave to stay in a country rescinded. Whenever asylum seekers are deprived of their liberty, pending the outcome of their application, they should be afforded with a wide range of safeguards in line with their status, going beyond those applicable to irregular migrants …'

[112] Cf. Hailbronner, K. 'Detention of Asylum Seekers', *European Journal of Migration and Law,* vol. 9 (2007), pp. 159-172.

detention. Until a decision has been made, so his argument goes, asylum seekers are to be considered as being unlawfully in the country.[113] Detention is reasonable, then, not because of their illegal arrival, but in order to prevent their illegal entry and continued stay. To be sure, the assumption is not that all asylum seekers are *malafide*. The problem is, precisely, that it cannot be decided beforehand who qualifies as a genuine refugee and who turns out to be a bogus claimant

1.4 Temporary Protection

Thus far, demurrals over restraints to the Refugee Convention have been discussed, as well as the way states have chosen to respond to these objections. Over against a willingness to fill the protection gap resulting from the limited 1951 refugee definition, states have displayed an impatient eagerness to adopt exclusionary practices with the excuse of putting a stop to the abuse of the asylum system. Generally it can be said that the subjection of potential refugees to the means of immigration control – which, recall all started with the problem of return – has launched the logic of abuse, evoking hostility and distrust towards protection seekers, while undercutting good decision- making on the merits of every asylum claim. It is noteworthy that the European Council on Refugees and Exiles (ECRE) accedes that the credibility of the asylum system lives on the return of rejected asylum seekers. Vice versa, ECRE stresses, the credibility and admissibility of any return policy is premised on the existence of fair and equal asylum procedures.

Contesting that these are in place,[114] ECRE argues 'that failure to protect those in need of protection fatally undermines the credibility of Member States' removal systems.'[115]

Given the repercussions of the embankment of illegal immigration on refugee protection, Moreno Lax rightly argues that 'deterring policies can no longer disregard the difference between asylum seekers and other migrants with the excuse that 'it is impossible to distinguish between persons who may be justified to claim a right or to be rejected or returned, and the large number of people seeking

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[113] The EU Return Directive, however, explicitly states that asylum seekers are not to be considered as illegal upon the territory of a Member State. Cf., footnote 43, above.

[114] Compare also Noll, G. 'Rejected asylum Seekers: the Problem of Return', *New Issues in Refugee Research,* working paper no. 4, (May 2009), p. 9: 'If the credibility of refugee protection systems is endangered by the non-return of rejected cases, it is equally endangered by indiscriminate non-admission policies. While states perceive a need to do something about the former inconsistency, they seem to be prepared to accept the latter.' Hailbronner, however, discharges this concern. After devoting two pages to statements by UNHCR, non-governmental organisations, and academic writers, who all voice concerns for the right to seek asylum, he concludes: 'By and large, these concerns are unjustified … It is clear that measures that have been undertaken in the field of common visa requirements, readmission agreements, prevention against trafficking in human beings, and the like, have not created an insurmountable barrier for third-country nationals seeking protection in the European Union.' (Hailbronner 2004, p. 57).

[115] European Council of Refugees and Exiles, *Information Note on the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008, on common standards and procedures in Member States for returning illegally staying third-country nationals*. Document CO7/2009/Ext/MDM, p. 4. In general, see also European Council on Refugees and Exiles, *Comments on the European Commission Proposal to Recast the Asylum Procedure Directive*, (May 2010); and also Human Rights Watch, *Fleeting Refuge: The Triumph of Efficiency over protection in Dutch Asylum Policy, (*April 2003).

admission for other purposes'.'[116] This section explores a possible answer to this challenge that ultimately provides an alternative for traditional forms of refugee protection. Disconnecting refugee protection from immigration might well be the sought-after answer to this problem. The declutch may be achieved by a regime of temporary (regional) protection. The present section outlines the current and heated debate on temporary protection. Temporary protection allegedly meets the objections discussed above, raised against the Refugee Convention, as it enables states to uphold their obligations and even extend protection to more persons in need of it, while at the same time taking into account the interest states have in combating illegal immigration.

Temporary protection differs from subsidiary protection discussed above, as it is typified by the demand for humanitarian protection. Temporary protection came into view -- again[117]-- in the 1990's as it supposedly provided a pragmatic tool to cope with the mass influx of refugees from the former Yugoslavia. Later, and after the fact as it were, temporary protection obtained legal form with the EU Directive on Temporary Protection in the Event of a Mass Influx of Displaced Persons (2001/EC/55).[118] The practices of states to grant temporary refuge to persons who escaped ethnic cleansing in Bosnia is potentially instructive for understanding the meaning and purpose of temporary protection.

Generally speaking, temporary protection is granted out of humanitarian concern as the safe return home under dignified circumstances is deemed to be impossible [119] due to a situation of armed conflict or generalized violence. The difference between temporary and subsidiary protection is that the standard of proof with respect to former is more easily satisfied.[120] The chief difference, however, between both forms of protection is to be found in article 19 of the Temporary Protection Directive which states that if an asylum claim has been rejected, the individual claimant 'continues to enjoy temporary protection for the remainder of the period of protection.' The generosity implied therewith has to be understood within the context that 'temporary protection is not self-executing', but is only activated if the Council of the EU decides that a mass influx of refugees exists.[121]

Importantly, temporary protection is granted with a view to eventual return. Temporary protection is thus contingent upon a prevailing situation of conflict and violence, and is to be withdrawn once the facts and circumstances that necessitated protection have come to an end. The explicit assumption of temporary protection is thus that return is a feasible option. [122] Accordingly, temporary protection is tacitly recognized to meet the objection that refugee protection is 'a slow 'yes' to

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[116] Moreno Lax (2008) p. 364. Moreno Lax here argues against Hailbronner, who is cited in the referred passage.

[117] For an historical overview of discourses on practices of temporary protection see Fitzpatrick, J. 'Temporary Protection for Refugees. Elements of a Formalized regime', *American Journal of International Law* vol. 94, (2000) pp. 282-287.

[118] Cf., Noll (2003), p. 340. For an overview of the historical development of Temporary Protection Directive, as well as some critical comments to it, see: European Council on Refugees and Exiles, *Position on Temporary Protection in the Context of the Need for a Supplementary Refugee Definition*, March 1997.

[119] Cf., Fitzpatrick (2000), p. 294.

[120] Cf., Goodwin-Gill & McAdams 2007, p. 328.

[121] Ibid., p. 329.

[122] Cf. Hailbronner 2004, p. 68.

permanent admission',[123] as it stresses the return home.[124] According to Joan Fitzpatrick, temporary protection allows 'democratic states in mediating public demands that asylum not be a back door to immigration, but that humanitarian ideals be sustained.'[125] Granted out of humanitarian concern, intended to protect against *refoulement* and with a view to eventual return, the Convention regime is not fully applicable to the beneficiaries of temporary protection. Trying to locate temporary protection within the overall regime of protection, Goodwin-Gill and McAdam therefore argue: '[W]ords such as 'refuge' and 'protection' may offer some advantage over any comparable use of the word 'asylum' in situations of mass influx. Asylum is undefined; it can be used broadly to signify protection of refugees, or it can be used in the narrow sense of a durable or permanent solution, involving residence and lasting protection against the exercise of jurisdiction by the State of origin. A receiving State called upon to grant 'asylum' to large numbers may well demur; admission is more likely to be facilitated by reference to the norm of *non-refoulement* …'[126]

While temporary protection is considered to be a particular instance of expanding the scope of persons in need of international protection[127], the dilution of protection has been a cause of grave concern among academics. This is particularly so because temporary protection may also be extended to persons who may fall within the scope of the 1951 Refugee Convention.[128] Though UNHCR has argued that the grant of temporary protection to Convention-refugees should only occur if, due to a sudden influx, normal asylum procedures are overwhelmed, EU law, by contrast, does not invoke a nervous exhaustion of the asylum system as a prerequisite for applying temporary protection to refugees.[129] In this respect the Directive seems aberrant. Though it does not, in theory, replace Convention-based protection, it does 'represent a threat to the 1951 refugee regime'[130] if applied to Convention refugees or persons otherwise in need of international protection. States will nonetheless be reluctant to assume obligations under a regime of temporary protection as this would most likely expand the number of persons in need of protection. This internal contradiction so to speak probably explains why the Directive has not been activated so far.

Again we see that the possible alleviation of the immediate plight of a potential large number of people does not unequivocally entail the level of protection as afforded under the Refugee Convention. In fact, the Temporary Protection Directive might well be taken as the definite separation of *non-refoulement* from the grant of asylum. As Goodwin-Gill and McAdam argue: 'In attaining its present universal and peremptory character, *non-refoulement* has separated itself from asylum in the sense of lasting solution.'[131] Though the Directive has not, as said, been

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[123] Hathaway, J. 'Preface: Can International Refugee Law be Made Relevant Again?', *Reconceiving International Refugee Law* (Ed. Hathaway), The Hague,: Nijhoff 1997 p. iii. Compare also Hailbronner 2004, 42: 'The flow of asylum applicants has become a major source of *de facto* immigration.'
[124] Hathaway & Neve (1997) p. 138.
[125] Fitzpatrick, J. (2000) p. 280.
[126] Goodwin-Gill & McAdam 2007, p. 343.
[127] Cf., Fitzpatrick (2000), p. 287.
[128] Cf., Goodwin-Gill & McAdams 2007, p. 328.
[129] Cf., Hailbronner, K. (2004) p. 64.
[130] Fitzpatrick (2000), p. 280. Cf. also Goodwin-Gill & Mc Adams 2007, p. 336.
[131] Goodwin-Gill & McAdam 2007, p. 344.

used, its existence is potentially instructive for understanding recurring discussions on alternative forms of protection, in particular with respect to the regional aspect of the Directive and the link it establishes between the temporary nature of protection and the eventual return home.

Indeed, the debate on temporary protection did not come to end with the adoption of this Directive. Before and after the referred Directive, discussions on temporary protection centered around a variety of questions that go to the heart of the refugee protection regime. These questions can be put together in the following general questions: should temporary protection be limited to situations of a mass influx, at the risk of including refugees who fled persecution? [132] Or, should it instead be granted to persons who do not fulfill the applicable criteria of the Refugee Convention and who escaped from armed conflict or ongoing severe violence? Should temporary protection be formalized and brought under the aegis of the law, extending the legal obligations of states with regard to persons in need of international protection?[133] Or, should it be regarded as an informal practice of discretion and humanitarian goodwill, dislodging it from the realm of enforceable rights?[134] Underneath these questions a genuine concern for the level of protection persists. Indeed, what caused the debate to be heated is the fear that temporary protection is not complementing the 1951 Refugee Convention but is instead replacing it. These misgivings are no doubt fostered by recurring discussions on new approaches to refugee protection that explore alternative forms of protecting refugees. In addition to the separation of *non-refoulement* and asylum states sought to achieve in their response to refugees from the former Yugoslavia, the catchword of current discussions on temporary regional protection is no doubt 'pro refugee, anti asylum.' Indeed, as Noll observes 'there is an interesting line of development from the introduction of Temporary Protection in the early 1990's to the contemporary discussion of 'new approaches'…' [135] After briefly discussing these 'new approaches' as proposed by different governments[136], I will turn to the academic debate on temporary protection.

In 2003, Amnesty International published a book of collected essays and papers that investigate, analyze and assess the exploration of alternative forms of protection.[137] The authors focused on the different viewpoints, and the legal issues they engaged, of the European Commission, the UNHCR and Member States. In particular, the focus was UNHCR's *Convention Plus* from 2002, and the already mentioned UK's *A New Vision for Refugees,* from 2003, which is generally considered to be to most radical, as it openly opts for exclusive temporary regional protection under the slogan 'pro-refugee, anti-asylum.' Another influential 'new vision' worth mentioning, is *People Flow. Migration and Europe* which was published on the opendemocracy.net and written, amongst others, by Theo Veenkamp who, at the time, was the head of the Netherlands Agency for the Reception of Asylum

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[132] Cf., Fitzpatrick (2000) p. 288.

[133]Cf. Ibid., p. 280. And in general also Castillo, M.A., & Hathaway, J. 'Temporary Protection', in Hathaway, J. ed. *Reconceiving International Refugee Law*, The Hague,: Nijhoff 1997, pp. 1-21

[134] Cf. Hailbronner, 2004, p. 65; Hathaway 2005, p. 26.

[135] Noll (2003), p. 340.

[136] For an extensive overview of these proposal, as well as critical analysis thereof see Noll (2003).

[137] *Niemandsland. Opvang van vluchtelingen in de regio,* Bruin, R. & Teitler, J., eds., Amsterdam: Amnesty International 2003.

seekers.[138] The basic tenet of Amnesty's book is that temporary protection does not, despite reassurances to the contrary, complement the Refugee Convention, but is instead replacing it, slowly committing euthanasia to the Convention and the international refugee protection regime.[139] However, as Gregor Noll rightly argues, these viewpoints and proposals on new forms of protection 'remain moving targets for analysis, as the political debate is still in a formative phase.'[140] Another disadvantage of comparing the different proposals is that it can all too easily be pointed out that the UK's *New Vision*, which constituted the main reason for concern, was rejected by the EC and UNHCR for reasons of being too radical. As the EC commented on the UK's proposal, any exploration of alternative forms of protection should respect and be fully committed to the 1951 Refugee Convention. However, the rejection of the UK's proposition may not hide from view that both Europe and the UNHCR are not ill-affected towards extraterritorial asylum policies.[141] In its *World Report 2011,* Human Rights Watch has observed that the 'UK and other EU countries (including Norway) pursued plans to build reception centers in Kabul, Afghanistan, in order to repatriate unaccompanied children, despite concerns over security and lack of safeguards.'[142]

To gain understanding of the stakes involved in the debate on temporary protection, it is, therefore, more fruitful to focus on the theoretical framework. James Hathaway provided such a framework. According to Hathaway, temporary (regional) protection constitutes a new paradigm in refugee law. His powerful plea for temporary protection is certainly meant as an antidote for the array of restrictive measures adopted to control refugee movements. In the co-authored article with Neve, 'Making International Refugee Law Relevant Again (1997), the authors argue that 'the deficiencies of the present asylum system are so severe that the *failure* to explore change would be unethical.'[143] By stressing that the real threat to refugee protection comes from a continuing unwillingness of states to admit and protect refugees, the critique is parried that temporary protection entails a degradation of the 1951 Refugee Convention.[144] For refugee law to be relevant and viable again, it is required that the rights of refugees be balanced with rights and

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[138] Cf., Bentley, T., Buonfino, A., Veenkamp, T., *People Flow. Migration and Europe,* 30 April 2003, published on opendemocracy.net, available at: http://www.opendemocracy.net/democracy-europefuture/article_1194.jsp

[139] Cf., *Niemandsland. Opvang van vluchtelingen in de regio,* Bruin, R. & Teitler, J., eds., Amsterdam: Amnesty International 2003, pp. 7-8.

[140] Cf., Noll, (2003), p. 303.

[141] For example, Afeef observes that 'in the years following the 2003 proposals, we have witnessed the development of an EU asylum agenda which places 'extraterritorial solutions' at the core of its asylum and immigration agenda. Indeed, a Commission Statement in 2003, states that 'serious thought be given to possibilities offered by processing asylum applications outside the European Union.'(Afeef, (2006), p. 22. Also, Karin de Vries gives an overview of the different elements that contribute to offshore asylum policies. Analyzing the legal issues that are raised by extraterritorial asylum policies, she concludes that three general elements of offshore asylum policies (i.e., regional protection, extraterritorial processing of asylum claims, and the return of asylum seekers to regional processing centres) 'could be implemented in some form on the basis of existing EC law.'(De Vries, K. 'An Assessment of 'Protection in Regions of Origin' in Relation to European Asylum Law', *European Journal of Migration and Law*, vol. 9 (2007) p. 102).

[142] Human Rights Watch, *World Report 2011*, p. 422.

[143] Hathaway & Neve (1997), p. 151.

[144] Compare Hathaway 1997, p. xxiv: 'Some will argue that a shift to equitable, open-textured obligations would weaken international refugee law. This criticism does not take into account, however, the decimation of the practical value of formal refugee law by policies of *non-entrée,* and the containment of refugees in their country of origin. I believe that it is morally irresponsible to insist on the sanctity of traditional legal standards that we know do not, in fact, constrain the self-interested conduct of states.'

interests of states. One way of achieving this balance, it is argued, is to opt for temporary protection with a view to returning refugees home, as this would relieve states of the burden of granting refugees permanent admission.

Importantly, Hathaway argues that temporary protection is neither complementing nor substituting the 1951 Refugee Convention. Rather, it is a way of *implementing* the Convention. Temporary protection accords with Convention-based protection, as the latter has always explicitly stressed the temporary nature of refugee status and does not in any whatsoever stipulate a right to permanent admission. In a co-authored article, 'Temporary Protection', Castillo and Hathaway thus argue: 'In asking whether there is good reason to consider the adoption of temporary protection as either a complementary remedy to, or replacement for, traditional modes of protection, commentators assume permanent integration to be the *status quo* position. To the contrary, at least in law, temporary protection is already the universal norm.'[145]

However, Hathaway does seem to admit that regional protection with a view to return, which is likely to reach a greater number of refugees compared to the current system, is in fact, qualitatively less than more traditional forms of protection: 'The small minority of refugees that presently find solid protection in developed states may see a reduction of their relative privileges under such a system, but a reduction in the Cadillacs of the few could, I believe, provide bicycles for the many.'[146]

To explain and fully appreciate the exploration of temporary protection, it should be kept in mind that temporary protection, almost of necessity, equals regional protection. If, the argument runs, temporary protection is really to serve the end of eventual return, its proper form should be regional protection, as sheltering refugees in their region of origin most likely facilitates their return home: '[P]roximity to the country of origin is desirable in order to facilitate eventual repatriation, and to allow for the prospect of greater ongoing contact between refugees and those of their community who have not left the home country.'[147] This bestows a wholly different and new meaning on the proposition that refugee law is not immigration which, recall, purported to express that the potential refugee takes up a different position compared to other immigrants. Against the backdrop of temporary protection, the proposition now seems to express that refugee protection does not imply immigration at all. According to Hathaway, then: 'Simply put, the human rights function of refugee law does not require a routine linkage between refugee status and immigration.'[148]

Indeed, it is the regional aspect that raises concern about temporary protection as a diluted or downgraded form of protection. To fully grasp the stakes involved, it must be understood in conjunction with the debate on extraterritorial asylum policies which have percolated into the issue of temporary protection from its very beginning.[149] The coincidence of offshore policies and temporary protection

[145] Hathaway & Castillo 1997, pp. 1, 2.
[146] Hathaway 1997, p. xxvii.
[147] Hathaway & Castillo 1997, p. 16.
[148] Hathaway 1997, p. xxiii.
[149] For a discussion of the social and political context in which discourse on extraterritorial asylum policies arose, see Afeef (2006).

evidences that the issue of return not only relates to rejected asylum seekers, but is extended to all asylum seekers and refugees.

Let me briefly sketch the contours of extraterritorial asylum policies. Generally speaking, we find three elements[150]: 1) protection in the region of origin which requires that regional protection capacities be supported and improved, 2) extraterritorial processing of asylum claims, and 3) the return of asylum seekers to regional processing centers where they can either avail themselves of protection because of (1), or have their claims assessed because of (2). Extraterritorial asylum policies seek to disconnect refugee protection from their immigration to the West (which, recall, was the core aim of the UK's *New Vision*) and/or strengthen the prevention of illegal immigration by conferring refugee status before departure. Importantly, even though the UK's proposal was declined, the EU is not, as said, ill-affected towards offshore asylum policies. In this respect, it is important to keep in mind that attention for extraterritorial policies and temporary protection coincided with increased blocking of access for potential refugees to the territory of EU Member States.[151] Indeed, offshore policies are even presented as solving the problem that states can only differentiate between a real refugee and a bogus claimant after adjudication, which seriously disempowers states to combat illegal immigration. In its *Policy Plan on Asylum,* the EC thus recommended that 'mechanisms capable of allowing for the differentiation between persons in need of protection and other migrants *before* they reach the border of the potential host state must be adopted.' [152] According to some, extraterritorial asylum policies are, therefore, nothing but an extension of the *non-entrée* regime for refugees.[153]

Indeed, with protection available in the region of origin, and the existence of extraterritorial processing centers, it is legitimate to ask what remains of the right to seek asylum in one of the Member States of the European Union. As De Vries explains, asylum seekers are likely to be rejected upon arrival 'not because the applicant is not in need of protection, but because the state examining the application considers that protection should be sought elsewhere.'[154] Obviously, 'elsewhere' refers to protection havens or safe areas (the appropriate word here is 'camp'. I will return to that in the next chapter) under the control of UNHCR and/or other NGO's. The objection raised against this form is that it is limited, at best, to the prohibition of *refoulement.*[155] But as De Vries rightly argues, it must be

[150] Cf., De Vries (2007), pp. 84-87.
[151] Cf., Fitzpatrick (2000) p. 286.
[152] As cited in Moreno Lax (2008) p. 364.
[153] Cf., Harell-Bond, & Verdirame 2005, pp. 55, 56; Also, Afeef (2006), p. 7.
[154] De Vries, K. (2007) p. 87.
[155] De Vries shows that the responsibility of European member states in extraterritorial protection havens is limited to the prohibition of *refoulement*. Cf. Ibid., p, 93 and compare p.102: 'The standards set by the Asylum Procedures Directive and the ECHR require, at the very least, protection from *refoulement*. However, only limited responsibility exists on the part of Member States for human rights violations occurring in protection zones outside the EU. In any case, states hosting the protection zone will be (co) responsible, which begs the question whether accusations of 'shifting the burden of refugee protection to the regions of origin' are not at least partly justified. Of course, Member States may well provide a level of protection that exceeds the minimum standards set by EC and international law, but the question is whether they will do so in the absence of any legal obligation. They could even be discouraged from doing 'too much', as greater engagement also increases the risk of becoming responsible for human rights violations occurring in the protection zones.' See also: Catz, P. 'Export of Protection. Could this enterprise ever be successful?' in R. Bruin & J. Teitler eds., *Niemandsland. Opvang van vluchtelingen in de regio* , Amsterdam: Amnesty International 2003, p. 37.

kept in mind that protection from *refoulement* alone falls short of the level of protection provided to asylum seekers who make their applications in the EU. Protection from *refoulement* does not imply access to material reception conditions such as health care, education and housing.'[156]

The grave consequences for refugees of this diluted form of protection are aggravated by the fact that there is ambiguity over the responsibility to give protection.[157] As it is unlikely that neighboring countries in the region of origin -- which already shelter large numbers of refugees -- are willing to take full responsibility for refugee protection, they will probably abdicate key elements of protection to UNHCR. Therefore, chances are that the current practice of sheltering refugees outside the jurisdiction of the host state, with UNHCR in charge of assisting and controlling refugees, will be intensified.[158] The corollary thereof is that UNHCR will act as a *de facto* sovereign, deciding upon to whom protection will be offered and to whom it will be refused. However, according the 1951 Convention, since states are responsible for refugee status determination, the handing over of this responsibility to UNHCR entails the risk that the legal status of refugees remains undetermined. Whereas in the territorial asylum procedure the enjoyment of protection and rights follows upon recognition, recognition as a refugee by UNHCR does not automatically establish a link with protection rights and resettlement. While states are eager to abdicate responsibility of protection to UNHCR, they are unlikely to endow UNHCR with the responsibility of refugee status determination – a key element in refugee protection – as this would require that they transfer a considerable and important aspect of their sovereignty, for which the right to inclusion and exclusion is quintessential, to a non-state actor.[159]

Humanitarian regional temporary protection does not afford refugees certainty about their legal status. Instead, it leaves their status undetermined. This is in flagrant opposition to the explicit aim of the Refugee Convention which, recall, aims to restore the legal person of the refugee so as to assure him the widest possible exercise of his rights and freedom. Indeed, temporary protection levels protection in the legal sense down to sheltering refugees in camps where they are offered humanitarian assistance. Harell-Bond very well captures the point when she argues with respect to protection offered by UNHCR: '[A]ssistance to refugees is conceived of in terms of charity rather than as a means of enabling refugees to enjoy their rights.'[160] The statement of UNHCR on the cover of *Refugee Magazine,* on the occasion of the 50th anniversary of the Refugee Convention, proves to be

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[156] De Vries, K. (2007) p. 93.

[157] Cf. Catz 2003, pp. 31-54.

[158] For a critical study on this role assumed by UNHCR and the practical and legal issues it engages see Harell-Bond & Verdirame 2005.

[159] Cf. Catz 2003, p. 41.

[160] Harell-Bond, B. 'Can Humanitarian Work With Refugees be Humane?' *Human Rights Quarterly,* 2002, vol. 24, (2002) pp. 52, 3. Grahl-Madsen also observes that assistance is not necessarily precluded from our refugee protection system, as is shown by the sheltering of refugees in camps of UNHCR, yet he points to the difference between protection and assistance: 'International protection must be distinguished from international assistance. Protection suggests a tripartite relationship: One party protects a second against … a third party… Assistance, on the other hand, denotes a bilateral relationship between a provider and a recipient … The grey area between assistance and protection becomes apparent in the context of a typical refugee situation, involving the provision of care and sustenance in a refugee camp.' Grahl Madsen, 'Protection of Refugees by Their Country of Origin', in Macalister, P. & Alfredsson, G. eds., *The Land Beyond. Collected Essays on Refugee Law and Policy, by Alte Grahl-Madsen*, p.323.

telling (and unsettling) in this respect. To celebrate, UNHCR apparently wanted to explain the meaning and purpose of the Convention by adding to it: 'The Wall Behind Which Refugees Can Shelter.'[161]

Concerns with respect to temporary protection are compounded by the fact that, with UNHCR as the main provider of 'protection', refugees are left without a supervisory authority to observe if protection and rights are granted to them. Consequently, refugees have little, if any, legal remedies for the violation of their rights,[162] which is all the more pressing given the fact that their rights are massively violated in 'protection zones' administered by UNHCR.[163] In their extensive and long-term research on protection in the region of origin under the control of UNHCR, Harell-Bond and Verdirame have focused on human rights violations instead of refugee situations in which human rights were respected, 'not with the aim', they explain, 'of casting a negative light on governments or UNHCR, but because, as a matter of fact, *no* refugee enjoyed his or her rights when confined to a camp/settlement.' [164] Absent a supervisory authority, without access to legal remedies on the part of the asylum seekers, according to Verdirame, 'what happens on the ground is much more the result of individuals' decisions and personalities than of the application of standards and procedures. The social scientist may consider this to be a completely self-evident statement, but for the lawyer … this finding is rather discomforting.'[165] Indeed, with their status undetermined, and the impunity of the violations of their rights, refugees, according to Noll, are held in a worldwide state of exception.[166]

I have tried to demonstrate that the regional aspect implied in temporary protection has provoked its opponents to agitate against it, exposing it as an inhumane regime that only serves the interests of states to keep refugees at bay. It is no exaggeration to say this form of alternative protection is utterly incapable of fulfilling the explicit purpose and aim of the Refugee Convention as laid down in its preamble.

Still, I believe that temporary protection brings to light the fundamental conceptual presuppositions of the Refugee Convention, and the international protection regime that developed from it. The distinguishing feature of temporary protection is not, as Hathaway asserts, that it explicates and remolds the temporary nature of protection. Given the temporary nature of refugee status, such an assertion is nothing but stating the obvious. Rather, the distinguishing feature of temporary protection is that it puts into practice the conceptual pre-understanding

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[161] UNHCR, *Refugees Magazine,* issue 123: "The Wall Behind Which Refugees Can Shelter – the 1951 Geneva Convention 50th Anniversary', (July 2001). Available at: http://www.unhcr.org/publ/PUBL/3b5e90ea0.pdf.

[162] Griek, I. 'Traditional Systems of Justice in Refugee Camps: Cause for Concern? in Pattanaik, Mk. Ed. *Human rights of migrants: Issues and perspectives*, Hyderabad: ICFAI University Press 2009, pp. 140-152.

[163] For a critical analysis of human rights violations and the role of UNHCR with regard to this see: Verdirame, G. 'Human Rights and Refugees: The Case of Kenya', *Journal of Refugee Studies*, vol. 12 1999, pp. 54-77; Harell-Bond (2002), pp. 51-85; Verdirame & Harell-Bond, *Rights in Exile. Janus Faced Humanitarianism.* Berghahn Books, New York/ Oxford, (2005); Bruin & Van Anken, 'Vluchtelingenkampen: juridisch niemandsland onder de hoede van UNHCR', in Bruin, R. & Teitler, J. eds., *Niemandsland. Opvang van vluchtelingen in de regio*, Amsterdam: Amnesty International 2003, pp. 97 – 118.

[164] Harell-Bond & Verdirame 2005, p. xiv.

[165] Verdirame (1999), pp. 54,5.

[166] Compare Noll (2003) p. 340: 'The notion of "Temporary Protection" can be validly described as a state of exception imposed on the European refugee regime. Temporary Protection denoted a regime allowing States to opt out of ordinary asylum processing by leaving the question of status undetermined.'

that *refugees ought to be there, not here*. And in doing so, it explains why, among the three durable solutions to the refugee problem, repatriation or return has always taken priority. Moreover, temporary protection reveals, as will be argued in the next chapter, that the camp is the hidden fourth durable solution to the refugee problem. Though the camp is a glaring disavowal of the aim to afford refugees international legal protection, it can nevertheless be traced back to the conceptual terms that shape current understanding of the refugee problem, and that has directed the international legal response thereto. In the next chapter, I will, therefore, focus on the *concept of the refugee*, arguing that the current conceptual understanding is ultimately and entirely inadequate to grasp the nature of the refugee problem.

2

The Concept of the Refugee

In the previous chapter, I asserted that temporary protection – regardless of the question whether it complements, implements or replaces the 1951 Refugee Convention – brings out the conceptual master frames that shape the current understanding of the refugee problem, as it plays out the assumption that refugees, at the end of the day, belong in their home country, not in the country of asylum. In this chapter, I will substantiate that claim. I will demonstrate and analyze this conceptual pre-understanding that identifies the refugee problem as a problem of *de facto* statelessness. In Chapter Five, I will again return to the issue of *de facto* statelessness, arguing that it fails to grasp the predicament that befalls refugees and is therefore inappropriate to direct the legal response to the refugee question. In particular, it will be argued that the very concept of *de facto* statelessness is at the root of the perplexities that pertain to the concept of asylum. In the present chapter, however, I will demonstrate that by virtue of the concept of *de facto* statelessness, the international refugee protection regime is rooted in the basic distinction between here and there. More precisely still, *de facto* statelessness upholds and secures this distinction as it plays out the assumption that refugees do not belong here but ought to be there. The refugee, however, shatters this distinction, as he is no longer there nor yet here, but is instead *nowhere*. *De facto* statelessness, however, secrets the refugee's displacement, veiling that he is indeed nowhere. And in doing so it collapses the 'there' where the refugee supposedly belongs, into the nowhere of the camp, the absolute non-place, where the refugee's displacement, instead of being resolved, continues.

2.1 *De facto* and *de jure* Statelessness

Chapter One already spelled out the problem which the international refugee protection regime seeks to redress. It does not, as said, seek to solve the problems that cause people to flee in the first place. Instead it responds to the predicament that befalls refugees upon fleeing. This predicament relates to the lack of legal protection the refugee is suffering. Refugees are therefore considered to be a class of unprotected persons. The international community responds to this by offering

international protection so as to restore the legal person of the refugee and afford him protection and rights.

As to the issue of unprotected persons, the historical background of the emergence of the refugee protection regime is edifying. In a letter from 1921 on the question of Russian refugees, the International Red Cross expressed the view that the lack of any form of protection was the main cause of the distress these refugees had to suffer. Also, it expressed awareness that the presence of thousands of unprotected persons scattered throughout Europe constituted an anomaly in international law: 'These people', the Red Cross Committee stated, 'are without legal protection and without any well-defined legal status. The majority of them are without means of subsistence, and one must particularly draw attention to the position of the children and the youths amongst them who are growing up in an ever-increasing misery without adequate means of education, and who are in danger of becoming useless and harmful elements in the Europe of tomorrow ... [It] is impossible that, in the 20th century there could be 800,000 men in Europe unprotected by any *legal organization recognized by international law*.'[1]

Refugees were referred to as unprotected persons not only because they could no longer rely upon their home government to grant them protection, but also mainly because they could not invoke protection under international law which was premised on the principle of reciprocity between states. The bilateral agreements that constituted international law assured that the citizens of state X be respected and protected upon their travel to state Y, provided that the citizens of the latter be accorded the same treatment upon their arrival in X. If this principle of reciprocity was not respected, the alien was likely to be denied access to the territory of a foreign state. As Van Panhuys explains, 'an alien could not lay claim to legal protection by virtue of his general status of an alien, but rather by virtue of the fact that he was *a national of foreign State*.'[2] The alien was a *Gast im Recht*, enjoying legal protection under international law, provided that his national government will give him its backing.[3] International law was thus clearly premised on the view that the responsibility for the alien lay within his own state of nationality. This gave states the right to grant their nationals diplomatic protection in the face of injuries by another state in whose territory they remained, based 'on the notion that "whoever ill-treats a citizen indirectly injures the state.'[4] Vice versa, states had the absolute duty to take back their nationals. Indeed, the duty to readmit constituted the basic guarantee for international law.

However, international protection of the alien, contingent upon the fact that his home government will give him its backing, was of no avail to the refugee. The distinguishing feature of the refugee, after all, was that he could no longer rely upon his home government. In a letter from 1949 to the Social and Economic Council, the International Refugee organization (IRO) brought the refugee's exclusion from international law to awareness: 'The refugee is an alien in any and every country to which he may go. He does not have the last resort which is always open to the

[1] Memorandum From the Comité de la Croix-Rouge at Geneva to the Council of the League of Nations, League *of Nations Official Journal*, March-April 1921, p. 228.
[2] Van Panhuys, H.F.*The Rôle of Nationality in International Law*, Leiden: Sijthoff's Uitgeversmaatschappij, Leiden,1959, p. 44.
[3] Cf., Ibid., p. 57.
[4] Waas, van L. *Nationality Matters. Statelessness under International Law*, Antwerpen: Intersentia 2008. p. 219.

"normal alien" -- return to his own country ... Moreover, the refugee is not only an alien wherever he goes, he is also an "unprotected alien" in the sense that he does not enjoy the protection of his country of origin. Lacking the protection of his country of origin, the refugee does not enjoy a clearly defined status based upon the principle of reciprocity as enjoyed by those nationals of those states which maintain normal diplomatic relations ... A refugee is an anomaly in international law, and it is often impossible to deal with him in accordance with the legal provisions designed to apply to aliens who receive assistance from their national authorities.'[5]

From the viewpoint of international law, the refugee was, strictly speaking, not even an alien, i.e., a foreign national who, by virtue of his nationality, belonged to another state. Excluded from the possibility to return home where he could avail himself again of state protection, it could no longer be properly said that the refugee belonged 'there', i.e., in his country of origin. If the refugee was said to constitute an anomaly in international law, this was clearly because the refugee shattered the very distinction between here and there, which is the concrete manifestation of the inside/outside divide by virtue of which a polity limits itself over against another. Neither belonging there nor here, the refugee was placed on equal footing with the stateless person who does not have a nationality under the law of any state, and who is, therefore, destitute of protection.[6] In fact, there wasn't even a clear distinction between refugees and stateless persons: Both were classified under the common denominator of unprotected persons. Though refugees often formally retained their nationality, the international community judged it to be inappropriate to still consider them as belonging to a state that seriously impaired, afflicted and threatened them. The international community, for example, took this position with respect to German Jews under the regime of Hitler. Though still regarded as nationals by the national-socialist administration, the international community did not consider Jews to be German nationals, as their nationality no longer effectively protected them.[7] Hence, Weis in his *Nationality and Statelessness in International Law* (1979), argues that it 'is evidence of the importance attached to international protection as an element of nationality that persons deprived of protection, i.e., refugees, are frequently classed together with persons destitute of nationality, i.e., stateless persons, under the common denomination of unprotected persons.'[8]

Nonetheless, though refugees were considered to be stateless for technical purposes, there was general agreement that the root causes of refugeehood differed from the problems causing statelessness. As statelessness is the reverse of nationality, its causes are believed to be rather technical and legal in nature. Weis broadly enlists the causes of statelessness: 'A person may either be stateless at birth, as a result of the fact that he does not acquire a nationality at birth according to the law of any state, or he may become stateless subsequent to birth by losing his nationality without acquiring another.'[9] Refugeehood, by contrast, occurs when

[5] Communication from the International Refugee Organization to the Economic and Social Council (1949) as cited in Hathaway 2005, pp. 84, 85.
[6] Cf. Weis, P. *Nationality and Statelessness in International Law*, Alphen aan den Rijn / Germantown: Sijthoff & Noordhoff International Publishers 1979, p.161.
[7] Cf. Ibid., pp. 59, 60.
[8] Ibid., p. 44.
[9] Ibid., pp. 161, 162.

persons escape the threat that state authorities exert over their lives and freedom. In the classic study, *The Status of Refugees in International Law* (1966), Grahl-Madsen, therefore, holds that as far as refugees are concerned, the lack of protection is the symptom of which persecution is the disease: 'The lack of state protection is not relevant unless it is caused by a deep-rooted political controversy between the authorities and the individual ... [The] preoccupation with the refugee's lack of protection leads to concerning oneself with ambivalent symptoms rather than with the real issue, namely that it is characteristic for a refugee that his relations with the authorities of his home country have become the negation of the normal relationship between a State and its nationals (and residents).'[10] Grahl-Madsen sums up the argument: 'Refugees are unprotected as a matter of fact, not as a matter of law, as are the stateless.'[11]

It has been this line of reasoning that has motivated the distinction between *de facto* and *de jure* statelessness to develop. *De facto* statelessness identifies the refugee problem, whereas *de jure* statelessness constitutes what is commonly understood by statelessness. *De facto* statelessness purports to express that the lack of protection is a matter of fact, rather than of law. Though the bond of nationality is currently broken, ineffective and of no avail to the refugee for reasons of persecution, *de facto* statelessness expresses the assumption that the refugee is, in principle, a national of his state. *De jure* statelessness, by contrast, expresses that a person is nowhere a national, as he is left unclaimed by any and every state. Indeed, statelessness reflects that there is no single state on earth that could be attributed the legal responsibility of protection.

Apparently, then, there is a clear and obvious distinction between the refugee and the stateless person. The distinction was reaffirmed and consolidated by the adoption of the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.[12] To fully understand this ramification and grasp the implications thereof, these two Conventions and their drafting history need to be taken into account.

The difference between the two groups of unprotected persons can perhaps be best explained by looking at the technical purposes of the relevant Conventions, and the difference in orientation in the way international law deals with these respective issues. With respect to refugees, international law responds to a situation that comes into being as a consequence of past occurrences in the home country that have induced a fear of persecution. With respect to statelessness, by contrast, the principle focus of international law is on the problems that cause statelessness in order to reduce it and prevent statelessness from occurring in the future. This difference in orientation is entrenched in UNHCR's mandate responsibility concerning refugees and stateless persons. In its *Action to Address Statelessness. A Strategy Note* (2010), in which UNHCR limits itself to the issue of *de jure* statelessness while stating that the problem of *de facto* statelessness is to be dealt with on a further occasion, it is explicated that '[i]n contrast to the UNHCR's international refugee protection mandate, a principle focus of the stateless mandate

[10] Grahl-Madsen, *The Status of Refugees in International Law*, Leiden: Sijthoff, 1966, pp. 98, 99.
[11] Cf., Ibid., p.97.
[12] Hereafter collectively referred to as the Statelessness Conventions.

is to prevent statelessness from occurring in the first place.'[13] This difference in orientation is constituted by the fact that statelessness – the reverse of nationality – is considered to be a legal and technical problem caused by gaps in nationality legislation, lack of access to birth registration, failures to issue identity documents[14] and problems resulting from state succession.[15] The perception of the legal and technical nature of the problem is reflected in the 1961 Convention on the Reduction of Statelessness.

But of course, until matters of nationality are settled so as to resolve the predicament of stateless persons, they are in need of protection. The 1954 Convention Relating to the Status of Stateless persons aims to afford such protection in the absence of nationality. Whereas there is hardly any difficulty in stating the difference between the refugee and the stateless problem on the basis of the 1951 and the 1961 Conventions, things become more complicated with respect to the 1954 Convention due to its close relation to the Refugee Convention. In fact, the issue of statelessness was originally intended to be dealt with in an additional protocol to the Refugee Convention which would allow for a *mutatis mutandis* application of the provisions of the Convention to the stateless. However, during the second conference of plenipotentiaries in 1954, convened by the Social and Economic Council, it became clear that a protocol wouldn't be an appropriate document.[16]

There were, no doubt, all sorts of practical reasons for this; the most obvious being that not all states who ratified the Refugee Convention participated in the second conference, whereas states not party to the Convention intended to sign the protocol. But the main reason why a formally and materially independent Convention for the stateless was created eventually was derived from the question of scope: Which persons were to be covered by an international instrument that afforded rights and protection to the stateless? It turned out that a clear demarcation between the refugee and the stateless person was of utmost importance. But it proved to be a difficult task to draw the line.

As Nehemiah Robinson's influential interpretation of the 1954 Stateless Convention and its history shows, the first question with respect to scope arose from the fact that many refugees were also stateless. Indeed, article 1A (2) of the Refugee Convention that provides for the refugee definition explicitly includes a person without nationality who, owing to a well- founded fear of being persecuted,

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[13] UNHCR 'Action to Address Statelessness: A Strategy Note', *International Journal of Refugee Law*, vol. 22, p. 304.

[14] Clearly, these causes of statelessness are of direct effect to immigrants who remain within a state without any legal status. Though Noll does not explicitly deal with the issue of statelessness, his reflections on the failure of human rights to protect illegal immigrants gives insight in the problems illegal immigrants encounter, and the misery they suffer (Cf., Noll, G. 'Why Human Rights Fail to Protect Undocumented Migrants', *European Journal of Migration and Law*, vol. 12 (2010) pp. 241-272). As estimates over the number of immigrants illegally present in Europe run high, it is clear that statelessness is not a problem of developing and undemocratic countries, but that Europe has its own stateless population, as well (Cf., Van Waas, L. 'The Children of Irregular Migrants: A Stateless Generation?', *Netherlands Quarterly of Human Rights*, vol. 25 (2007) pp. 437-458).

[15] These are, of course, the apparent causes of statelessness. There is general agreement that discrimination is more often than not a key factor in causing statelessness. Cf., UNHCR 'Action to Address Statelessness: A Strategy Note', *International Journal of Refugee Law*, vol. 22, p. 305.

[16] For the history and interpretation of the 1954 Convention, see: Nehemiah Robinson, *Convention Relating to the Status of Stateless Persons. Its History and Interpretation*, Published by World Jewish Congress 1955, Reprinted by UNHCR in 1997. Available at http://www.unhcr.org

cannot return to the country of habitual residence. This inclusion expresses a clear awareness that statelessness adds to the risk of a person becoming a refugee (refuting, as a matter of fact, that statelessness is a mere technical and legal issue). It is important to stress, however, that if a stateless person is granted protection on the basis of the Refugee Convention, this is for reasons of a well-founded fear of persecution. Put differently: Even though a stateless person can be a refugee – and many refugees are, in fact, stateless[17] -- he is not a refugee on account of being stateless. This is crucial, as it reflects that statelessness is not essential to the refugee definition. As Simpson puts it: 'Not all stateless people are refugees, nor are all refugees technically stateless. Statelessness is not the essential quality of a refugee, though many refugees are in fact stateless.'[18] Consequently, it was decided that persons coming within the ambit of the 1954 Stateless Convention were not to be covered by the 1951 Refugee Convention. However, during the discussion of the definition of statelessness, the question whether or not persons who have not lost their nationality but refused to avail themselves of the protection of their state of origin was back on the table. Eventually, agreement was reached that the Refugee Convention already expressed the extent to which the international community was willing to protect those who were stateless *de facto*. To solve the quandary about the definition, the secretary-general of the second conference referred to a definition of statelessness in the report, *Nationality, including Statelessness,* by a Special Rapporteur of the International Law Commission. The definition read as follows: 'Stateless persons in the legal sense of the term are persons who are not considered as nationals by any state according to its law.'[19] According to Nehemiah Robinson, this 'definition clearly referred to *de jure* stateless persons only, because if a person was only stateless *de facto* he was still considered a national by a state.'[20]

But the question as to which persons the Stateless Convention was to apply still remained somewhat unresolved, as is evidenced by the fact that the Convention in its final act (after a long debate whether it should be included in the first definition article) recommended states to also extend the benefits of the Convention to persons who are stateless *de facto*.[21]

So, despite the material and formal independence of the 1951 and 1954 Conventions the refugee and stateless person are not mutually exclusive. This is most clear from the fact that legal responsibility for the stateless begins with refugees who are stateless (article 1(A) 2 of the 1951 Convention) and that the Convention that responds to the problem of the absence of nationality includes a facultative clause to extend its provisions to persons who are stateless *de facto*. In its *Recommendation on the Acquisition by Refugees of the Nationality of their Country of Residence* (1969), The Council of Europe seems to refer to this clause. In consideration 9 (b) (ii), the Council recommends states ' to treat *de facto* stateless refugees as though they were stateless *de jure*.'[22]

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[17] Cf., Darling, K. 'Protection of Stateless Persons in International Asylum and Refugee Law', *International Journal of Refugee Law*, vol. 21 (2009), pp. 742-767.
[18] Simpson, as cited in Grahl-Madsen 1966, p. 77.
[19] Cited in Nehemiah Robinson 1997 p. 8.
[20] Ibid, p. 8
[21] Cf. idem pp. 8, 9.
[22] Council of Europe Recommendation 564 (1969). In its *Recommendation on Certain Aspects of the Acquisition of Nationality* (1973), no. 696, the Council again points out that 'in addition to legal provisions concerning *de jure* statelessness, adequate measures require to be taken for those who have no effective nationality, i.e. who are

In this respect, another observation can be made. *De facto* statelessness, recall, relates to the lack of protection the individual is suffering, despite the fact that he or she formally retains his or her nationality. The refugee, in other words, suffers from an ineffective bond of nationality. Albeit currently broken, *de facto* statelessness thus presupposes the individual's legal attachment to his or her own country. The upshot thereof is that the relation between the individual and the state of nationality is not made irrelevant. According to Grahl-Madsen, however, this is not entirely correct from a legal point of view. Recall that diplomatic protection was predicated on the view that the alien enjoys protection, not because of rights that accrue to him as an individual, but because he is a national of a foreign state. As ill-treatment of an alien also harms the state to which he belongs, the latter is justified to act and intervene on behalf of its citizens in a foreign territory. Suppose, Grahl-Madsen says, that the refugee's nationality still matters. This would imply that his former home government would still be justified to act on his behalf.[23] As we saw, however, at the beginning of this chapter, the refugee constituted an anomaly in international law, as he was excluded from diplomatic protection. Accordingly, article 7 of the Refugee Convention exempts refugees from the principle of reciprocity that, recall, was the key principle of protection of aliens under international law. Though article 7 postulates that refugees shall be accorded the same treatment as aliens, the underlying assumption is not that the refugee equals the alien, but instead, the stateless person. As Grahl-Madsen argues: 'The drafters of the Convention on the Status of Refugees were of the opinion that the formal nationality that some refugees possessed was ineffective, as the refugees could not in anyway benefit from it ...Article 7, dealing with the exemption from reciprocity, further evidenced the fact that recipient states were expected to assimilate fully those refugees possessing a formal nationality along with those who were stateless.'[24]

Grahl-Madsen takes the argument a step further. It is not inconceivable, he argues, that a refugee avails himself of diplomatic protection again; for example, when his state of origin issues him a passport. But this can have an adverse effect upon refugee status, as the asylum country can hold that the passport is proof of the regained protection by the refugee's country of origin. Grahl-Madsen reminds that diplomatic protection is only relevant in the international sphere and is not in and of itself a guarantee that internal protection is available as well.[25] For this very reason, Grahl-Madsen argues that refugee recognition should occasion the making irrelevant of the refugee's former nationality: 'States of asylum are now realizing that their refugees may become long-term visitors. The refugees, for their part, fear their states of nationality and seek protection from their new home. International refugee law has proved slow to deal with the conflicts governments face, as exiled citizens, still nominally "protected" by their home state, seek to adjust to their state of asylum. Refugee law must clarify the role that the state of nationality should play

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stateless *de facto* (refugees)'. In the light of this, the Council recommends states to 'to introduce provisions whereby, in the case of *de facto* statelessness (ineffective nationality), the absence of an authorisation required under the national law of another State would cease to be an obstacle to naturalisation in member States after a given period.'

[23] Cf., Grahl-Madsen 1966, p. 98.

[24] Grahl-Madsen 2001, p. 335.

[25] Cf., also Van Panhuys 1959, p. 161.

once a refugee has fled it. This article proposes a norm of international refugee law wherein the state of origin, by breaking its ties with a refugee, loses any right to "protect" or act on behalf of the refugee.'[26] Clearly, the claimed irrelevance of the refugee's former nationality also has its bearing on the issue of asylum and the refugee's integration within the host state. I will return to that in Chapter Five.

However, notwithstanding the alliance between the refugee and the stateless person, the chief difference between them still holds. This difference, as intimated already, is rooted in the distinction between *de facto* and *de jure* statelessness and finds expression in the widely held belief that statelessness is not essential to the refugee dilemma.

This, no doubt, has caused the distinction between *de facto* and *de jure* statelessness, a prevalent theme during the years following and preceding the Refugee Convention, to recede into the background. But with the recent and seminal study on statelessness by Laura Van Waas, which she presents in *Nationality Matters. Statelessness under International Law* (2008), the distinction came into view again. What is striking in her argument is a profound understanding of the importance – both in a legal and anthropological sense – of nationality. This enables Van Waas to fully bring to awareness what the absence of nationality amounts to for those individuals whose lives are destitute of protection. However, it is this very same profound understanding of why nationality matters, that enables me to take Van Waas' argument beyond the issue of statelessness and take issue with the alleged distinction between *de facto* and *de jure* statelessness.

Though Van Waas' academic concern is clearly with the stateless, she carefully documents the correlation between the phenomena of refugeehood and statelessness.[27] Putting forward impressive empirical data, she demonstrates that statelessness is an important factor in producing mass displacement,[28] while at the same time showing that refugees are often at risk of becoming stateless.[29] Nonetheless, she retains the strict division between *de facto* and *de jure* statelessness. Commenting on the above cited letter from IRO, she argues: 'This dire predicament indeed befalls the refugee, since the factual situation in the country of origin prevents him from returning home to exercise his rights as a national or calling in the assistance of his home country. However, where the stateless are concerned, this fate is sealed in legal terms – only to be resolved through the attribution or restoration of the bond of nationality.'[30]

The picture that unfolds from Van Waas' argument is that the refugee is a non-national in the country of asylum; the plight of the stateless person is that he is a non-national everywhere. The sticky situation of the refugee is that the factual situation in his home country prevents him to return; the quandary of the stateless person is that he has *no* where to return. The refugee is suffering from an ineffective bond of nationality; the stateless person has no nationality at all. Indeed,

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[26] Grahl-Madsen 2001, p. 320.
[27] Cf. Van Waas (2007) pp. 437-458.
[28] Cf., Van Waas 2008, p. 13.
[29] Cf., Ibid., , p. 179. Compare also Ibid., pp. 416,417: '[W]e discovered a connection between statelessness and displacement, as well as the fact that the possession of an unlawful or ambiguous immigration status to the creation and perpetuation of statelessness.'
[30] Ibid., p. 225.

the lack of nationality, Van Waas holds, is not essential to the refugee definition which, she reminds, 'relies on a question of fact rather than of law.'[31]

Van Waas is right to the extent where the application of the refugee definition is at issue. As the refugee's protection need results from a factual situation in which the authorities are persecuting the individual, or are unable or unwilling to protect him against the aggression of non-state actors, the refugee's nationality must be established in order to identify the persecutors. With a view to the conferral (or refusal) of refugee status, there is no way of denying the relevance of the refugee's nationality, or, to put it in more general terms, of his relation to his own country. But the important question to be raised, of course, is whether *de facto* statelessness, which presupposes the continuing connection between the refugee and his own country, even though this relation is currently perverted or severed, adequately grasps the fundamental dilemma the refugee experiences and for which he seeks international redress. I hold that it does not. The sharp-edged division between *de facto* and *de jure* statelessness which transcends the formal refugee definition, effectively denies that the refugee, like the stateless person, has no *where* to return. *De facto* statelessness, I will argue veils the refugee's displacement[32] and hence is part of the cause of the ongoing misery refugees are suffering in today's world.

In order to explain, the role and function of nationality in international law needs to be taken into account.

Generally speaking, nationality establishes the relation between the individual and the state responsible for granting him or her rights and protection. Consequently, nationality is the precondition for the enjoyment of rights, and has as such been coined as the right to have rights.[33] Van Panhuys, for example, even wonders whether it is consistent and reasonable to enlist the right to nationality among human rights (article 15 of the Universal Declaration of Human Rights) provided that the enjoyment of all other human rights is predicated on nationality.[34] As nationality establishes the relation between the individual and the state, nationality, according to Weis, is an *element of order* allocating individuals to a state.[35] In his philosophical exploration of the spatiality of the law, Hans Lindahl grasps with great clarity the philosophical concern with respect to nationality : '*to*

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[31] Ibid., p. 21.

[32] Though Lissa Malkki does not elaborate on the concept of de facto *statelessness,* she does argue that the current regime of international refugee protection veils the refugee's displacement. Cf., Malkki, L., 'Refugees and Exile: from refugee studies to the national order of things', *Annual Review of Anthropology*, vol. (1995b), p. 516.

[33] Arendt invokes the notion of 'a right to have rights' in her influential discussion of the refugee question in *The Origins of Totalitarianism*. To be sure, Arendt herself does not take the right to have rights to denote the right to nationality. As Van Waas points out, US Supreme Court Chief Justice Earl Warren is said to have rendered nationality as the right to have rights. His description of the individual's plight upon loss of nationality is certainly reminiscent of Arendt's reflections: 'The total destruction of an individual's status in organized society [that] strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself.' (US Supreme Court Chief Justice Earl Warren as cited in Van Waas p. 218.) Aleinikoff suggests that Chief Justice Warren actually quotes Hannah Arendt (Cf., Aleinikoff, T. 'Comments on the Rights Of Others', *European Journal of Political Theory*, vol. 6 (2007), p. 426). I will discuss the arendtian notion of a right to have rights in more detail in Chapter Three.

[34] Cf. Van Panhuys 1959, pp. 219-221.

[35] Cf. Weis 1959, p. 53.

ascribe rights and obligations is also always to assign a legal place to persons and vice versa.'[36] Nationality, in short, *emplaces the individual,* informing us where he or she ought to be and properly belongs.

The absence of nationality is, therefore, tantamount to the lack of a legal place where a person ought to be and properly belongs. Van Waas drives at a similar conclusion by focusing on one pparticular aspect of nationality, to wit, the right to freedom of movement. The right to freedom of movement, she argues, is a function of nationality, as it entails (1) the right to re-enter one's own country, (2) the right to remain, and (3) the right to leave[37]. Echoing Arendt, who cautions that refugees and the stateless are only, in appearance, free to move, as their 'free' movement 'gives them no right to residence'[38], Van Waas pins down the fundamental dilemma of the stateless (to which she, contra Arendt, limits her argument): 'This fact signals a grave potential difficulty for the stateless: no nationality, so no automatic right to (re)enter or reside anywhere. With this observation in mind, the right to international free movement for the stateless is not only relevant to the ability to "vote with one's feet" … but indeed reveals a more basic dilemma: where do they have a right to live?'[39]

On account of the notion of *de facto* statelessness, the answer to that very same question seems relatively simple for refugees. As their lack of protection is considered to be a brute but not a legal fact, refugees have a right to live in their own country. Indeed, driven to the limit, *de facto* statelessness assumes that refugees, at the end of the day, ought to be there, i.e., in their own country, not here, where they are out of place and do not belong.

Surely, this ties in with the self-understanding of some refugees for whom their belonging in the abandoned country is a matter of justice. Invariably, the Palestinian's insistence on their right to return comes to mind. I'm not denying that refugees themselves might decide or wish to return[40], nor do I intend to indict return as such. What interests me are the veiling effects of the concept of *de facto* statelessness. And what worries me is the primacy, both on a practical and theoretical level, of return in matters of asylum. These will be the topic of the next section. The purpose of critically analyzing *de facto* statelessness is not to haul up return as a durable solution to the refugee problem but to deprive it of its predominance which is taken for granted today.

2.2 The Spatiality of Law: Belonging Here, There, Nowhere

Recall that the very notion of *de facto* statelessness aims to capture the plight that befalls refugees upon fleeing and for which they seek international redress. If,

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[36] Lindahl, H. K. 'Finding Place for Freedom, Security and Justice. The European Union's Claim to Territorial Unity.', *European Law Review*, vol. 29 (2004), p. 478.
[37] Cf. Van Waas, 2008, pp. 240-248.
[38] Arendt, H. *The Origins of Totalitarianism*, San Diego/New York/London: Harcourt Inc., 1969, p. 296. Hereafter referred to as OT.
[39] Van Waas 2008, p. 246.
[40] The term repatriation applies in variety of situations. According to Zieck, the repatriation of refugees to their country of origin is 'the one instance of repatriation that is invariably qualified by the adjective 'voluntary.' (Zieck, M. *UNHCR and Voluntary Repatriation of Refugees. A Legal Analysis,* PhD diss., Tilburg University 1997, p. 2).

however, the role and function of nationality are taken into account, the inadequacy of *de facto* statelessness becomes manifest. Nationality, Weis reminds us, is an element of order as it allocates the individual to a state responsible for his or her protection. Nationality, in other words, calls to mind that rights and duties do not just accrue to the human being, but are instead contingent upon a status that identifies and emplaces the individual. The one who is forced to live outside the bonds of nationality therefore forfeits a legal place where he can enjoy and exercise his rights and freedoms. Indeed, on the understanding that law emplaces human beings in terms of rights and duties, the refugee loses his *abode*. That is, he loses the place where he abides by the law and where he is properly dwelling.[41]

De facto statelessness rightly captures the lack of protection the refugee is suffering. But qualifying this lack as a brute fact, it fails to see that this lack is tantamount to the loss of an own place which is legally warranted. Indeed, in common parlance it is said that the refugee flees his *own* country. If I, as a Dutch citizen, travel the world, I move from place to place. But the refugee, by crossing an international border, does not, for that matter, move within a common world. Upon his arrival in the targeted host state, the refugee is not emplaced, i.e. is not where he by virtue of his nationality ought to be. But since his nationality is no longer of any avail to him, the refugee can neither be said to be misplaced. Neither emplaced, nor misplaced, the refugee rather lacks a place of his own. If refugees are indeed said to be displaced persons, their displacement should be taken to denote this legal lack of an own place. It is in exactly these terms that Lindahl understands displacement: '[I]ndividuals who are not in-legal-place … are not simply misplaced in virtue of not being where they ought to be; instead they are *displaced*, that is to say, they claim a legal place of their own for which there is no place within the distribution of places made available by a region.'[42] In Chapter Five it will be argued that the claim to asylum must be understood as a claim to an own place. For now it suffices to say that the desperate experience of refugeehood is to belong nowhere in this world. That the refugee, upon crossing an international border, belongs nowhere in the legal sense, affects him in every aspect of his life. He cannot find shelter in his private existence against this legal aberration (the point will be further discussed in Chapter Three where the 'right to have rights' is elaborated). Even if the refugee were to settle spontaneously in another country and grow social and economic attachments there, then this very fact of social and economical belonging does not protect him against the legal fact of belonging nowhere as he would live under the constant threat of detention and deportation.[43]

The refugee who arrives at the borders of the potential host state certainly comes from outside. But the refugee's outside is not a foreign state, positioned

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[41] Cf. also Lindahl (2006), p. 887.

[42] Ibid., pp. 888, 889.

[43] On the specific issue of detaining and deporting refugees who spontaneously settled in host countries see Malkki, L. *Purity and Exile: Violence, Memory, and National Cosmology among Hutu Refugees in Tanzania*, Chicago: The University of Chicago Press 1995a, p. 263. A similar argument can be developed with respect to undocumented immigrants. Even though they certainly constitute an important work force, this does not seem to warrant any form of legal protection. According to Noll, the undocumented immigrant 'is socially and legally embedded in the *oikos*.' (Noll (2010), p. 263). But as Noll continues to argue, any 'move to vindicate human rights under the CMW [Migrant Workers Convention] with the host state may be countered by expulsion, any move to vindicate labour-related rights with the employer may be responded to with the threat of informing the authorities of the irregular presence of the migrant in question.' (ibid,. p. 257).

over against the receiving state. That is, the refugee's outside cannot be reduced to a qualified and determined 'there' (a foreign country, a different state). Indeed, the refugee is not an alien or a foreigner. Rather, he is a stranger in the strong sense of the word on account of his displacement. The decennia preceding the 1951 Refugee Convention expressed a clear awareness of this. When, recall, in 1949, the Social and Economic Council was called upon to define the refugee problem, it was argued that the refugee was an alien in each and every country he went to. Worse still, he was not, strictly speaking, an alien, as the alien's option of last resort, i.e., return home, was not open to him. Considered to be an anomaly in international law, the refugee really was a stranger, as he fell outside the distribution of places that made up international legal order. But also recall that the distinction between *de facto* and *de jure* statelessness was not as clear cut then as it is today.

As a refugee[44] one does not register in any legal order. The predicate *de facto* statelessness is precisely meant to register those who do not register anywhere. However, this does not unequivocally entail that they register after all, for example in a supra-national legal order, as is sometimes believed. By referring to those who do not register, the supra-national legal order can always retreat to a mere reconfirmation that they do not register, without any normative implications. Indeed, the predicate *de facto* statelessness brings some veiling effects to bear upon the refugee question. Perceiving the lack of protection to be a mere factual matter, *de facto* statelessness roots the international refugee protection regime in the basic distinction between here and there. This distinction is one manifestation of the inside/outside divide that is constitutive for democratic legal order. Indeed, without taking up a place here, which a polity recognizes as its own place as it is separated from foreign places beyond the border, the inside/outside divide would be incomprehensible. As long as each individual has a place of its own within the distribution of places that make up order, the distinctions between here and there, own and foreign properly function to delimit an inside over against an outside. [45] Simply put: We, the members of this particular polity, belong here, in this place we deem to be our own, while non-members, i.e., the others, belong there, that is, in a foreign country, a different state. Aware of the fact that violence, repression and war force people to live outside their country of origin, *de facto* statelessness nevertheless adheres to this simple scheme and bears out the presupposition that we live in a common world where each individual has a place of its own. *De facto* statelessness thus seems to provide the correctives for the refugee's 'misplacement' in the asylum country, where he does not properly belong but only serves time so to speak.

However, the veiling effects of *de facto* statelessness can no longer be ignored. For it can only be consistently argued that someone does not belong 'here' if to the 'here' a determined and qualified there corresponds. The refugee, however, disrupts this correspondence. He disrupts, that is, the binary qualifications grids of the 'here' and 'there' which are constitutive for the common world we live in. *De facto* statelessness keeps this disruption in check so to speak. Yet the disruptive force of

[44] Note that the argument follows the refugee after his flight and before his arrival in the asylum state. The usage of the word 'refugee' does not, therefore, refer to a person recognised as such by the conferral of refugee status.

[45] For the following analysis of the relation between emplacement, misplacement and displacement, I am highly indebted to Lindahl.

refugee movements becomes manifest whenever asylum policies exclusively aim at return and, in particular, when return 'home' proves to be impracticable or impossible. [46] For, then it becomes clear that the 'there' is no longer a qualified somewhere (a foreign country, a different state) determined over against a particular 'here'. On the contrary, and quite literally, the 'there' where the refugee supposedly belongs becomes a 'no matter where, as long as it is not here.'

This is quite an adequate formula to capture a regime of temporary protection as discussed in the previous chapter. Indeed, with respect to temporary protection one should not be put off with the temporary nature of protection as its alleged novelty. The novelty of temporary protection is, rather, that it puts into practice the conceptual pre-understanding that refugees do not belong here but 'there.' If it is offered in affluent Western countries, temporary protection is contingent upon the seclusion and exception of refugees from host societies, lest they not integrate and take up a place. For, if anything is likely to reduce the chances that refugees are willing to return 'home', it is their integration in host societies. But things become all the more precarious, as temporary protection figures in a discourse that seeks to disconnect refugee protection from immigration. If return 'home' then proves to be impossible, refugees are at risk of being indefinitely 'held' in 'settlements' or 'safe areas' that are excepted from the normal order of societies that 'host' refugees upon their territory. In his incisive analysis of current debates on temporary protection, Gregor Noll depicts what happens if under a regime of temporary protection neither of the three durable solutions (i.e., return, resettlement or integration) is available: 'Consider a situation where a refugee… finds that all the resettlement quota are exhausted, local integration is unavailable, and voluntary repatriation inconceivable due to a persistent risk in her country of origin. Given that Temporary Protection Centres are conceived as closed centres, such a refugee would be confined to indefinite detention. The same would apply to a person whose claim was rejected … but who cannot be returned to his or her home country for whatever reason that is beyond the person's control.'[47]

Indeed, the current practice of sheltering refugees in camps administered by UNHCR and other NGO's gives a pretty good idea what a regime of temporary protection in the region of origin comes down to. Temporary regional protection, as well as refugee camps, both share in the same assumptions: 1) that the facts and circumstances that necessitated protection won't prevail and come to an end within a reasonable period of time, and 2) that refugees belong in their home country. As Harell-Bond and Verdirame put it: 'UNHCR's promotion of repatriation as the

[46] To be sure, Van Waas is well aware of the fact that in numerous cases returning refugees is unfeasible. But she seems to limit her argument to refugees who are also stateless: Compare Van Waas 2009, p. 247: '[T]he fact of statelessness commonly presents an irreconcilable obstacle to eventual repatriation of refugees and other such displaced persons.'

[47] Noll, G. (2003), p.334. With respect to the impossibility of returning failed asylum seekers, Kate Darling casts the lack of regard for statelessness within asylum procedures as a grave failure of the system. Compare Darling (2009), pp. 764, 765: 'Without a presumption that statelessness implies discrimination amounting to persecution, making a case for this at the removal stage is very unlikely. .. The discussion about what removal means for stateless persons simply does not take place and existing international human rights obligations are not reflected upon. Underlying all removal discussions in cases of statelessness is the sticky question: what do we do with people who are not refugees, yet, who have no state willing to accept them on their territory either as temporary residents or as citizens? In some cases, failed stateless claimants just wait in the destination country, under the constant threat of being deported one day, uncertain of their present or future status.'

best 'durable solution' to the refugee problem has consolidated the policy of encampment, on the grounds that refugees are temporary.'[48] With respect to the temporary nature of the problem, which supposedly legitimizes practices with a view to return home, they argue: 'By viewing countries of asylum as 'waiting rooms' before repatriation, UNHCR has virtually given up on integration, choosing instead to coerce refugees to the margins of host societies and to segregate them in camps … repatriation is premised on the view that refugees have an eternal and visceral tie with the country of origin – 'home' – the place to which they will always belong.'[49]

Yet, the slogan 'There is no place like home', adopted by UNHCR to celebrate return,[50] acquires a wholly different meaning against the backdrop of the statistics provided by UNHCR itself. These statistics show that for refugees there is indeed no place like home. In its memoranda, *Protracted Refugee Situations* (2004), UNHCR estimated that the average duration of major refugee crises has increased from 9 years in 1993, to 17 years in 2003.[51] UNHCR further estimates that over six million refugees find themselves in such a protracted refugee situation. The US Committee for Refugees and Immigrants estimates this number to be over ten million, the world's most protracted situation of Palestinian refugees not included.[52] Temporary regional protection is likely to increase already existent protracted situations 'in which refugees find themselves in a long-lasting and intractable state of limbo. Their lives may not be at risk, but their basic rights and essential economic, social and psychological needs remain unfulfilled after years in exile.'[53] Hence, Harell-Bond, on the basis of her own long-term research in refugee camps, concludes: 'The main context in which the distribution of internationally-funded assistance to refugees takes place is the refugee camp. Despite their ostensible 'temporary' nature, these settings have become the main living environment for many refugees for years and, in some cases, for more than one generation.'[54]

The ethnography of injustices and sufferings in refugee camps refute UNHCR's claim that the lives of refugees are not immediately at risk in refugee camps. Refugee camps are breeding places of diseases and epidemics,[55] of ethnic and sexual violence,[56] and are often attacked by armed groups from outside.[57] In the

[48] Harell-Bond & Verdirame 2005, p. 272.
[49] Ibid., p. 335.
[50] Cf., Ibid., p. 339. Compare also Anker, D. Fitzpatrick, D. & Shacknove, A. 'Crisis and Cure: A reply to Hathaway/Neve and Schuck', *Harvard Human Rights Journal*, vol. 11 (1998), pp. 302: 'One of the most serious flaws in a reformulation of refugee law to emphasize temporary protection is the fact that most refugee crises are enduring. It is the exception rather than the rule that the causes of flight can be resolved within the approximately five-year period that defines the outer bonds of a temporary protection regime meeting basic standards of humane treatment.'
[51] Cf., UNHCR, *Protracted Refugee Situations,* p. 151. Doc.No.EC/54/SC/CRP.14, available at: http://www.unhcr.org
[52] Statistics available at http://www.refugees.org/data/wrs/04/pdf/38-56.pdf.
[53] UNHCR, *Protracted Refugee Situations*, p. 150.
[54] Harell-Bond, B. 'Can Humanitarian Work with Refugees be Humane?', *Human Rights Quarterly,* vol. 24, (2002) p. 56.
[55] Cf., Damme, W. Van. 'Do Refugees Belong in Camps? Experiences from Goma and Guinea', *The Lancet*, vol. 346 (1995), pp. 360-362.
[56] Cf., Harell-Bond & Verdirame 2005; Malkki, L. *Purity and Exile: Violence, Memory, and National Cosmology among Hutu Refugees in Tanzania*, Chicago: The University of Chicago Press 1995.

Dadaab refugee camp in Kenya, Harell-Bond and Verdirame have recorded the development of what has been called the *buufis* syndrome. *Buufis* (which stems from Somali language) refers to a person who tries to escape the camp by repeatedly applying for resettlement to the camp authorities: 'In fact, *buufis* is a kind of disease spread through verbal expressions. It can have an advantage, because when someone goes to the UNHCR everyday consecutively, he may be given resettlement. But, it can also be life- threatening because if the person recognizes that he cannot go overseas, he may kill himself, starve himself or simply run mad.' [58] Massive violations of basic rights and the violence committed with impunity against refugees are among the plethora of the miseries of camp-life. Harell-Bond and Verdirame pin down the glut of injustices and sufferings inside refugee camps when they explain the methodology of their long-term research on sheltering refugees in camps which they present in *Rights in Exile. Janus Faced Humanitarianism*: 'We have focused on violations of human rights rather than on the instances in which human rights may have been respected, not with the aim of casting a negative light on governments or on UNHCR, but because as a matter of fact *no refugee* enjoyed his or her rights when confined to a camp/settlement.'[59]

Importantly, the lack of protection and the failure to afford refugee rights inside camps can be brought back to the violation of one specific fundamental human right. As Harell-Bond and Verdirame argue: 'We found evidence of violations of the full catalogue of human rights. Whether in a local camp or a settlement, refugees were effectively segregated – prevented from enjoying freedom of movement, a fundamental right upon which the enjoyment of other rights is contingent.'[60]

Keeping in mind that freedom of movement is a function of nationality, the camp which curtails refugees in this specific fundamental right, is the living proof of the fundamental dilemma refugees are facing: Where do they have a right to live? The concept of *de facto* statelessness, which obscures that this is the calamity refugees are exposed to from the moment they cross an international border, is therefore far from innocent. Veiling the refugee's displacement, *de facto* statelessness, instead of identifying the refugee problem blurs what is at stake. [61] Expressing that refugees, at the end of the day, belong 'there', it fails to see that the problem for which the refugee seeks international redress is that he is nowhere in a legal sense.[62]

Yet, the refugee's displacement is bound to recur. For at the limit of *de facto* statelessness the camp appears. Indeed, the 'there' where the refugee supposedly belongs is a no- longer existing homeland that collapses into the nowhere of the

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[57] Compare Anker, D. Fitzpatrick, D. & Shacknove, A (1998), pp. 300, 301: 'Many refugee emergencies arise in situations of historic enmity among neighbors: in such circumstances, a regional solution may aggravate the protection challenge rather than moderate it.'

[58] Cindy Horst as cited in Harell-Bond & Verdirame 2005, p. 286.

[59] Ibid., p. xiv.

[60] Ibid., pp., 15, 16.

[61] The glaring lack of awareness with respect to the refugee's displacement is sardonically illustrated by the practice of return as practiced by UNHCR. On November 26, 2010, UNHCR proudly posted a tweet on twitter about a young refugee smiling into the camera. The tweet included a link to the referred picture. The subscription to the photo read as follows: 'Born in Exile. A young Afghan refugee born in Pakistan, smiles for the camera in the government-funded township of Sheikh Mesri on the outskirts of Jalalabad. The girl is part of the community that left Pakistan in 2007, for the eastern province of Nangarhar. These returnees have no land and they are living in temporary accommodation. UNHCR is trying to secure land for them.'

[62] Cf., also Lindahl (2004), p. 481.

camp. As Malkki argues in 'News from Nowhere': 'The very notion of displacement implies emplacement, a 'proper place' of belonging, and this place has long been assumed to be a home in a territorial, sovereign, nation-state. The specific device of the refugee camp also operates in intimate relation to the logic of the national order of things. The camp presents itself, socially and juridically, as a 'space of exception', and as an emergency measure, and is yet startling routine and familiar.'[63] It is time, therefore, to see what the camp really is. It is not merely something to which we resort for practical reasons in times of emergency. On the contrary. The camp is the ultimate result of the conceptual framing of the refugee problem as a problem of *de facto* statelessness.[64] The camp, I submit, is the hidden fourth solution to the refugee problem.[65]

As to the recurrence of the refugee's displacement, it is important to keep in mind that camps are located outside the normal jurisdiction of the host state that gives space upon its territory to construct refugee camps. 'Host' states abdicate nearly all facets of protection to UNHCR and its implementing partners, the corollary being that UNHCR acts as a *de facto* sovereign. As already argued in Chapter One, this constitutes a grave difficulty for refugees, as the decision on their legal status is suspended with the effect that their legal status remains undetermined. Indeed, in *Homo Sacer. Sovereign Power and Bare Life,* the Italian philosopher, Giorgio Agamben, defines the camp as a space in which the state of exception, i.e., the temporary suspension of the validity of the law in times of emergency, materializes and becomes permanent. As a *space of exception,* the camp is taken outside the normal legal order and appears as the absolute non-place.[66] The camp thus announces the recurrences of the refugee's strangeness and anomalousness, as it gives a spatial arrangement to displacement. Put differently: The refugee's displacement, i.e., the fact that he is neither here nor there but nowhere, materializes into the nowhere of the camp. The camp – whether it is located in the region of origin, at the borders of Europe, or comes under the friendly face of the reception centre[67] -- signals that the refugee can nowhere be emplaced again, except in the camp where his displacement continues. Instead of restoring the legal person of the refugee so as to assure him the widest possible exercise of his rights

[63] Malkki, L. 'News from Nowhere: Mass Displacement and Globalized 'Problems of Organization', *Ethnography*, vol. 2 (2002), p. 353.

[64] In this respect it is worth mentioning that Malkki has analysed the use of former concentration camps in which refugees were sheltered after the Second World War. Sheltered in camps, refugees came accessible for research, documentation and interventions. Malkki argues that the post-war figure of the refugee largely took shape in these camps. Cf. Malkki (1995b), p. 500.

[65] In its fight against the 'warehousing' of refugees, the US Committee for Refugees and Immigrants also emphasise that warehousing refugees is a *de facto* and all too durable fourth solution, next to three official solutions of UNHCR. See: http://www.refugees.org/data/wrs/04/pdf/38-56.pdf. In this respect, it is important to note that, as pointed out by Liisa Malkki, UNHCR discourse influences a great deal of scientific inquiries into the phenomenon of refugees, the corollary being that basic assumptions about the problem, and the response thereto, remain unquestioned. One particularly disturbing example is that the use of refugee camps to control movements of people is passed over in silence. As Malkki argues: Other examples of the influence of the frameworks developed by international agencies on a wider world of scholarship include the widespread use of the bureaucratic UN model of the three "durable solutions" to the refugee problems – repatriation, integration and resettlement – as well as the relative absence of critical questioning of the refugee camp as an apparatus for the control of space and movement.'(Malkki (1995b), p. 505).

[66] Cf. Agamben, G. *Homo Sacer. Sovereign Power and Bare Life* (translated from the Italian), Stanford: Stanford University Press 1998 pp.168, 169.

[67] Cf. Ibid., p. 174.

and freedom, encampment strips the refugee of his legal and political status, reducing him to what Agamben calls bare life. Indeed, in camps, refugees have to suffer from what Arendt calls the abstract nakedness of being nothing but human. The camp contains the life that can nowhere be inscribed again,[68] giving a grim twist indeed to the refugee's displacement.

It is for this very reason that Hannah Arendt's influential exposition of the refugee problem is still relevant today. In the famous ninth chapter 'The Decline of the Nation-State and the End of Human Rights' of *The Origins of Totalitarianism,* Arendt offers a penetrating reflection upon the refugee and statelessness problem states were facing as a consequence of the wars that ravaged Europe at the beginning of the Twentieth Century. Until this present day, academic reflection on various forms of exclusion draws on Arendt's reflections. Contemporary readings of Arendt mainly elaborate the paradox of human rights she discerns and the subsequent right to have rights she invokes. The next chapter discusses the right to have rights in more detail. However, I do believe that the full weight of the right to have rights can only be grasped, and the significance thereof be established, if the situation in which this right insists is brought to awareness. Importantly, the right to have rights is not at issue whenever exclusion occurs, for example in cases where social, economic and cultural rights are jeopardized or only half-heartedly protected. On the contrary, on Arendt's view the right to have rights only makes sense whenever the right to residence is scuppered[69] with the effect that people are forced to live outside the pale of law. Indeed, Arendt's perceptive understanding of the refugee dilemma derives from the insight that the refugee, who is forced to live outside the bonds of nationality that connect him to a state, looses his place in this world. According to Arendt, then, the plight of the refugee is not only caused by an ineffective nationality, but is rather constituted by the fact that this ineffectiveness brings the refugee before the dilemma: where does he have a right to live?

As the refugee lacks a legally sealed place of his own, Arendt holds that the 'core of statelessness' is 'identical to the refugee problem.'[70] She therefore explicitly targets the difference between *de facto* and *de jure* statelessness, which she casts as one of the many efforts to simplify the refugee problem[71], with 'the express purpose of liquidating statelessness once and for all by ignoring its existence.'[72] Indeed, I believe that, with respect to the refugee question, the most important lesson to be drawn from *The Origins of Totalitarianism* is that the very distinction between *de facto* and *de jure* statelessness covers up the plight of refugees, and, moreover, effectively contributes to the continuance of the their deplorable

[68] Compare Ibid., p. 175: 'The state of exception, which was essentially a temporary suspension of the juridico-political order, now becomes a new and stable arrangement inhabited by the bare life that more and more can no longer be inscribed in that order. The growing dissociation of birth (bare life) and the nation-state is the new fact of politics in our day, and what we call *camp* is this disjunction. To an order without localization (the state of exception, in which law is suspended) there now corresponds a localization without order (the camp as permanent space of exception).'

[69] Cf., OT, p. 276.

[70] Ibid., p. 279.

[71] Compare ibid., p. 282 at footnote 28: 'The many and varied efforts of the legal profession to simplify the problem by stating a difference between the stateless person and the refugee – such as maintaining "that the status of a stateless person is characterized by the fact of his having no nationality, whereas that of a refugee is determined by his having lost diplomatic protection" – were always defeated by the fact that "all refugees are for practical purposes stateless.' For the sake of transparency, Arendt is citing Simpson here.

[72] Ibid., p. 279.

situation. There is little doubt that Arendt would have agreed with the International Law Commission's Special Rapporteur Hudson who, during the drafting process of the Convention on Statelessness, unavailingly pleaded to take the situation of refugees into account as well. Though Hudson retains the expressions of *de facto* and *de* jure statelessness in his 1951 report, he certainly intimates that the latter fails to come to terms with the refugee situation: 'It is true that the *de* facto stateless person has a potential nationality but it is not less true that this juridical nationality is an ineffective nationality. It seems to the Special Rapporteur that the most important aspect of this problem of statelessness is not the technical question of nationality only, but the real situation … The members of the Commission should bear in mind that *de facto* statelessness is much worse than *de jure* statelessness not only quantitatively but also qualitatively, because not only is it true that *de facto* stateless persons constitute by far the largest number of stateless individuals but it is also a fact that their condition is worse than that of the *de jure* stateless. They are not only deprived of the rights which derive from nationality but the mere fact that they are not technically deprived of nationality itself renders them incapable of obtaining a legal remedy under the proposed statue for stateless persons unless the Commission has the courage to face the problem and provides the said legal remedy.'[73]

Arendt takes the point a step further. Her critique is not that 'the statesmen' fail to address the increasing problem of *de facto* statelessness, but that they create this category in order to bring people out of legal sight, thus aggravating the problem. The deteriorating language on statelessness obscures the fact that the refugee has no where to return as it is effectively denied that statelessness is part and parcel of the refugee dilemma. 'Non- recognition of statelessness' Arendt points out, 'always means repatriation, i.e., deportation to a country of origin.'[74] But the trick of deportation is of course, that the country of origin is no longer a matter of course, to say the least, and Arendt highlights the fact that the country of return collapses into the camp. With respect to refugees, she therefore argues that 'their situation has deteriorated just as stubbornly, until the internment camp – prior to the Second World War, the exception rather than the rule for the stateless – has become the routine solution for the problem of domicile of the "displaced persons".'[75] Note that, when Arendt invokes the category of the stateless, she not only refers to persons who are stateless *de jure*, but to refugees as well. She highlights the camp solution again when she pins down the debate – reminiscent of our own times – on the refugee problem: 'Every attempt by international conferences to establish some legal status for stateless people failed because no agreement could possibly replace the territory to which an alien, within the framework of existing law, must be deportable. All discussions about the refugee problems revolved around this one question: How can the refugee be made deportable again? The Second World War and the DP camps were not necessary to show that the only practicable substitute for a nonexistent homeland was an internment camp. Indeed, as early as the thirties, this was the only "country" the world had to offer to the stateless.'[76]

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[73] International law's Commission' s Special Rapporteur Hudson as cited in Massey, H. *Legal and Protection Policy. UNHCR and* De Facto *Statelessness*, working paper UNHCR April 2010, p. 13.
[74] OT., p. 279.
[75] Ibid., p. 279.
[76] Ibid., p. 284.

The pertinence of Arendt's argument cannot be dispatched by arguing that her discussion of the refugee problem dates from a pre-Convention period. For its pertinence derives precisely from the fact that it draws attention to the misunderstanding of the refugee problem which is achieved by the refusal to recognize statelessness in new refugees arrivals, 'thereby making the situation of refugees even more intolerable.'[77] Arendt's analysis reminds us that the chief characteristic of the plight of refugees is the desperate experience of belonging nowhere in this world. Consequently, the lack of protection the refugee is suffering is not simply a brute fact, as opposed to the formal and legal lack of protection the stateless person is suffering. Admittedly, Arendt casts the issue of *de jure* statelessness to be a minor, innocent problem.[78] I do not believe statelessness to be a relatively innocent problem.[79] But the upshot of my argument is that the strict division between *de facto* and *de jure* statelessness is unattainable on a conceptual level. If, as I have argued, the camp appears at the limit of the notion of *de facto* statelessness, we are in need of a radical rethinking of the basis of the international regime of refugee protection. Indeed, as Harell-Bond and Verdirame argue: 'The debate on solutions to the refugee 'problem' has to start from the premise that warehousing refugees in camps and respecting their human rights cannot be reconciled.'[80]

In the remainder of this chapter, I will sketch out the conceptual terms and contours for rethinking the refugee question, and the international legal response thereto.

2.3 Refugees (Are) Like Us

In the previous sections, I demonstrated that the international refugee protection regime, by virtue of the concept of *de facto* statelessness, is reliant upon the distinction between here and there. This distinction, as said, is a manifestation of the inside/outside divide that is constitutive for democratic legal order, as it serves the mechanisms of inclusion and exclusion that are ingredient to the sovereign right of a democratic people to determine and rule itself. It is often assumed that refugee protection fetters this sovereign right and, hence, poses a challenge to the receiving community, as the boundaries that preserve and secure an inside over against an outside are crossed by the refugee. *De facto* statelessness, however, keeps this challenge in check, so to speak, as it presupposes, when driven to the limit, that refugees ought to be there, not here. Put differently: Instead of challenging the boundaries of a polity, the refugee, who is believed to be only stateless *de facto*, leaves these very boundaries intact. We have reasons to doubt, therefore, that refugee law, as has been assumed, discards the distinction between nationals and foreigners its *raison d'être*.[81] Instead of making this distinction irrelevant, refugee law seems to infinitely complicate it. Or, to put it more strongly, instead of making

[77] Ibid., p. 281.
[78] Cf. OT, p. 279.
[79] Indeed, in her study on statelessness, Van Waas made it perfectly clear that to consider the problem of statelessness as a mere technical issue is to oversimplify things.
[80] Harell-Bond &Verdirame 2005, pp. xvii, xviii.
[81] Cf. Hathaway 2005, p. 5.

redundant the distinction between citizens and foreigners, and the people and the others, refugee law contributes to a reinvigoration of democratic collective identity. Indeed, to the distinction between here and there, the distinction between the own and foreign corresponds. In this section, I will demonstrate that refugee protection also assumes, instead of challenges, the distinction between the own and foreign. I will take issue, indeed, with the common assumption that refugees challenge and disrupt the collective identity of a people on account of their different cultural, ethnic, religious, and linguistic identities. Hathaway expresses the common understanding of the challenge: 'Most refugees who seek entry to developed states today are from the poorer countries of the South; their "different" racial and social profile is seen as a challenge to the cultural cohesion of many developed states.'[82] I will argue, however, that the refugee, who is recognized as such, is not 'the other', but rather confirms who we are and what we want to be.

To begin with, the title of this section, 'Refugees are Like Us', is not open to reversal. It does not imply that the other way around, 'we are like refugees', is equally true, if only because this would bring us to the unsavory and perverse conclusion that, in the end, 'we are all refugees.' Rather, the claim that refugees are like us is the outcome of a reversal of the usual question. Following Bonnie Honing, who in *Democracy and the Foreigner* pulls the same trick with regard to foreigners and immigrants in general,[83] the question is not only: what can we do for refugees, but also: what are they doing for us? A preliminary answer to this question is that refugees, instead of disrupting our identity, in one way or another *affirm* who we are and want to be. That is, by protecting refugees, we fulfill the moral demands of humanity, upholding, in fact, our own moral and humanitarian ideals.

That a certain amount of self-assertion is part of the deal in protecting refugees is old news.[84] For example, in *Asylia*, Rigsby tries to find a rationale for the inscription in coins that declared places to be *asylios*, sacred and inviolable. This explicit declaration appears to be somewhat redundant, as certain sacred places, even without such an inscription, were automatically deemed to be *asylios* and a safe refuge for those in need of protection. Rigsby puts forward the hypothesis that these coins credited and honored the city-state involved: 'In the civic title sacred and inviolable … we can see a spirit of self-assertion on the part of the Greek city states.'[85] This spirit of self-assertion is also evidenced by Greek tragedy. So in Euripides' *Heracles' Children,* we hear the king of Athens proclaim upon his decision to grant the spouses of Heracles protection, that he would rather hang himself than do harm to the reputation and good name of Athens as a free city.[86] Also, in Aeschylus' *The Supplicant Maiden,* we read the chorus commenting on the king's request whether or not the women should be protected: 'may the people who

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[82] Hathaway 1997, p. xxix.

[83] Compare Honig, B. *Democracy and the Foreigner,* Princeton/Oxford: Princeton University Press 2001, p. 4: 'Rather than *'How should we solve the problem of foreignness?'* and "What should 'we' do about 'them'?" (questions that never put the "we" into question and this, surely, is part of their point and attractiveness), the question that animates this book is: '*What problems does foreignness solve for us?'*

[84] In general see Cavallar, G. *The Rights of Strangers. Theories of International Hospitality, the Global Community and Political Justice since Vittoria,* Ashgate: Aldershot 2002.

[85] Rigsby, *Asylia. Territorial Inviolability in the Hellenistic World*, Berkeley: University of California Press, 1996, p. 27.

[86] Cf. Euripides, *The Children of Heracles*, in ed. Allen, W., *The Plays of Euripides*, Warminster: Aris & Phillpis 2001.

strengthen the city / protect its dignity as well.'[87] Against the backdrop of the longstanding tradition of self-assertion, it comes as no surprise that asylum came to be used as what we today would call an ideological weapon. In Chapter One of Book 1 of *City of God* St. Augustine describes the violence afflicted upon Rome by the barbarians, and ascribes the greatness of Rome to the fact that the Romans designate churches and basilicas to be safe- havens for women and children, a practice unheard of in the history of the barbarians. One must be blind not to see, St. Augustine says, that this is a direct influence of Christ and the Christian faith.[88]

But of course, the self-image of the people can only be affirmed, and its dignity and humanitarian ideals be upheld, if the 'good refugees' are protected and the 'bad ones' excluded. To make a huge leap in time: This is what is decided upon in the asylum procedure. And as it turns out, the good ones are the ones who are like us.

As already said in the previous chapter, the enjoyment of protection and rights is contingent upon refugee status. Hence, a procedure to determine who qualifies as a refugee (or a person otherwise in need of protection) and who is discarded as such, is a prerequisite for international protection to become effective.[89] The category of the real, deserving or genuine refugee is, therefore, presupposed. But the category of the 'real' refugee is not a mere function of the eligibility criteria for which the Refugee Convention and the EU Qualification Directive provide.

In this respect, two general remarks can be made. First, it should be kept in mind that national administrations enjoy a great deal of discretion in defining and redefining the criteria. Due to this discretion, the threshold of protection can constantly be altered by defining anew central elements such as 'individual risk', 'persecution', 'safe (third) country', 'actors of persecution' and so on.[90] Secondly, it is hard to deny that, as Brochmann and Hammar put it, 'moral obligations tend to

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[87] Aeschylus, *The Supplicant Maiden* in Grene, D. & Lattimore, R., *Aeschylus II*, Chicago/London: The University of Chicago Press 1991, p. 30.

[88] St. Augustine, *The City of God*, London [etc.]: New ed 1967.

[89] Hence, the plea for an unconditional right to asylum oversimplifies things. This was strikingly illustrated by the discussion in Germany at the close of the Twentieth Century over article 16 of the constitution. Article 16, which stated 'Politisch Verfolgten genießen Asylrecht', expressed an individual right to asylum that corresponded to the moral obligation of Germany towards refugees. In the wake of large scale violence against foreigners and asylum seekers between 1991 and 1993, which was initiated by racist groups but over the course of time gained silent approval of a large part of the German population, the governing parties CDU/CSU committed themselves to the view that Article 16 of the Constitution was in need of revision. Instead of informing and explaining to their constituents the principled importance and value of refugee protection, the governing parties seemed to excuse the violence of extreme-right groups, attributing it to a large-scale increase in asylum applications (Cf., also Noll, G. 'The Non-Admission and Return of Protection Seekers in Germany', in: *International Journal of refugee Law*, vol. 9 (1997), p. 415). A constitution change with regard to Article 16 was thus called for, in order to formulate and narrow the conditions under which Article 16 could be invoked. Opponents of this revision were eager to argue that asylum was a matter of hospitality and generosity. Some even expressed the view that to consider asylum as a right would already diminish Germany's moral obligation *vis-a- vis* refugees (Compare Tönnies, S. 'Kann Asyl ein Recht sein?', *Zeitschrift für Rechtspolitik*, vol. 25 (1992), p. 43: 'Der guten Sitte des Asyls ist nicht damit gedient, bei den Rechten eingereiht zu werden; gerade deshalb muß sie heilig gehalten werden, und zwar als Pflicht.') Premised on the assumption that asylum resorts under hospitality, it was argued that whomever wants to be generous, must be willing to take the risk of offering asylum to those who were, perhaps, not entirely sincere and justified in claiming asylum. One member of parliament in particular, Von Mangfoldt, was passionate to defend this argument: "Wenn wir irgend etwas aufnehmen würden, um die Voraussetzungen für die Gewährung des Asylrechts festzulegen, dann müßte an der Grenze eine Prüfung durch die Grenzorgane vorgenommen werden. Dadurch würde die ganze Vorschrift völlig wertlos.'(as cited in Kimminich, O. *Asylrecht, Berlin:* Luchterhand 1968, p. 78.

[90] Cf., Fitzpatrick (2008), p. 292.

become more relevant as motivations for government action when they coincide with some state or party interest. Admission of refugees, for example, is often influenced by foreign policy.'[91] Indeed, the Refugee Convention is assumed to be a 'Cold-War-document', an assumption evidenced by the statement of a high-ranking American official that 'each refugee from the Soviet orbit presents a failure of the Communist regime.'[92] Just as refugees from communist countries once served the interests of Western capitalist states, today's refugees present a failure of the 'third world.' As Spijkerboer pins down the politics of refugee protection: 'The Western world in the form of, for example, the World Bank, the International Monetary Fund, or military action (based on a United Nations mandate, or not) exerts considerable power over the South. If no efforts were made to legitimize this situation, this would seem to be the exercise of purely economic or military force. The West needs a general story for why the developing world cannot help itself, and why it needs our guidance on its way to a better future. Refugee law can be one of the places for the creation of such a legitimating story.'[93]

So, clearly then, the category of the 'real' refugee is not simply predicated on the refugee definition, but is subjected, as well, to other conditions and circumstances that change from time to time.[94] But of course this is not the whole story. We can only come to a full understanding of the discrepancy between the 'real' refugee and the relevant definitions if the refugee's credibility, which is decisive in the status determination process, is taken into account. Indeed, in the asylum procedure, everything depends upon whether or not the protection seeker is able to present a credible account of the reasons for his flight and can convince the authorities that he is, in fact, in need of international protection.[95] As Robert Thomas argues: 'While much legal analysis has been devoted to the legal tests governing the determination of refugee status (e.g., the meaning and application of "persecution", "membership of a particular social group" and the "internal flight alternative"), the majority of claims are determined on their individual factual circumstances. If an individual making an asylum or human rights claim cannot persuade the decision-maker that his claim is properly to be regarded as credible, then he is unlikely to be recognized as a refugee or as a person otherwise in need international protection.'[96]

Since much, if not everything, depends upon the asylum seeker's credibility, the two possible outcomes of the asylum procedure, i.e., recognition or rejection, heavily rely on the distinction between the trustworthy, genuine, deserving refugee,

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[91] Brochmann & Hammar 1999, p. 4. In general see also Goodwin-Gill, G. 'The Politics of Refugee Protection.', *Refugee Survey Quarterly*, vol. 28 (1998), pp. 8-23

[92] High ranking American official, cited in: Spijkerboer, T. *Gender and Refugee Status*, Nijmegen: Gerard Noodt Instituut 1999, p. 197.

[93] Ibid., p.199.

[94] For example, in the Netherlands, the abrogation of the policy of humanitarian temporary protection for refugees who escaped war in Afghanistan and Iraq, coincided with the sending of troops to these countries. With Dutch peace-keeping troops present in Iraq and Afghanistan, there would no longer be a need for refugees to be protected in the Netherlands, as the troops were supposed to protect them there.

[95] Compare Hathaway 2005, p. 1: 'The greatest challenge facing refugees in the developed world has traditionally been to convince authorities that they are, in fact, entitled to recognition of their refugee status.'

[96] Thomas, R. 'Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined', *European Journal of Migration and Law*, vol. 8 (2006), p. 79.

on the one hand, and the undeserving, untrustworthy or even bogus claimant, on the other.[97] This prompts the question: What makes a claim credible or incredible?

In this respect, the comprehensive and close analysis of over two hundred asylum claims filed by female applicants in the Netherlands conducted by Thomas Spijkerboer is particularly instructive if not revealing. Spijkerboer points to the discrepancy to explain what motivated his research: 'People who are recognized as refugees certainly come from countries where human rights are violated, but so do people whose applications are rejected. Analyses investigating the relationship between the human rights situation in various countries of origin and recognition rates fail to identify a meaningful relation. The situation of women in many countries is bad, but this does not explain why some of them are considered as refugees and others are not. Refugee law is clearly inspired by humanitarian impulses, but this does not explain why some profit from this while others do not. I am trying to understand why Srilankan Anne … is not a refugee while Bosnian Laurie … is; what they experienced is pretty similar.'[98]

Spijkerboer's focus on women is not inspired by the fact that the refugee definition is supposedly oblivious to persecution grounds specific to women. Albeit an important issue, this is not his main concern. What interests him instead are the underlying normative assumptions that affect decision- making in asylum cases. His analysis reveals that with respect to female applicants decisions are based on 'clear assumptions about femininity, gender and sexuality.'[99] Female applicants have to accord with our basic normative notions in order to be deemed credible. That is, they have to be, and behave, like us. For example, they have to prove to be good mothers, mourning in the appropriate way over the death of their sons – even if this is unrelated to their flight motives. They have to show clear signs of grief, as an unmoved account of their losses is likely to be interpreted as mendacious, just as the mother or wife who is hysterical is believed to be only performing an act. '[The] asylum procedure', Spijkerboer argues, 'heavily relies on the concepts of gender and ethnicity. Applicants must conform to the assumptions related to these concepts; if they do not, they are basically incomprehensible as refugees and may be deemed incredible, non-deserving or even abusive.'[100]

Though Spijkerboer's analysis is limited to the hearings and decisions on female applicants, his conclusions can easily be generalized. Just as the female asylum seeker is constructed as a refugee, or not, so is the male applicant, albeit in a different way.[101] In this respect, Jan Blommaert's close analysis of the subjection of asylum seekers to identification processes that emphasize the national order of things is insightful. As language is part and parcel of the national order, Blommaert focuses on the imagination of language in the context of the asylum procedure. In his seminal article, 'Language, Asylum and the National Order', Blommaert meticulously discusses the case of Joseph, a young refugee from Rwanda whose story looks like a contemporary version of the biblical account of shibboleth.

[97] The Dutch Aliens Act, for example, includes the category of 'lying unaccompanied minors'. For the sake of nuance, however, it should be added that, at least in theory, an asylum seeker can give a credible account, but nevertheless, does not qualify as a refugee or person otherwise in need of international protection.
[98] Spijkerboer 1999, p. 201.
[99] Ibid., p. 5.
[100] Ibid., p. 8.
[101] Cf., Ibid., p. 195.

Blommaert reconstructs the normative assumptions on language that motivated a negative decision in this case. As to the reasons of rejection, Joseph's case is not unique: Joseph was discredited, and hence his claim rejected, as the language profile he displayed significantly deviated from the official language of Rwanda. The immigration authorities were, therefore, certain that he didn't come from Rwanda, casting him as an asylum seeker who lies about his nationality, and guessed that he was probably from Uganda (though it was clear that Joseph didn't fluently speak the official language of that country, either).

Blommaert pins down the normative assumptions on language that affected decision- making in this and other cases. Desperately trying to establish the nationality of the claimant, the authorities mistakenly believe that language is indicative of a person's origin. Moreover, language is assumed to be static and timeless. Both assumptions are not without effect to decision- making, as they inspire the disqualification of the claimant whose sociolinguistic speech and repertoire do not fall tidily within the national order and its language. Blommaert refutes these assumptions, arguing that it is wholly reductive to assume a coincidence between language, origin and nationality. A refugee may not properly speak the language of his home country, but the speech he uses might very well reflect the realities of his region of origin. Indeed, given the troubled history of many countries from which refugees come, it is not unlikely that they, or their parents, lived on an exit strategy, moving from one part of the country to another, or even across state borders to find employment or seek safety. This no doubt causes linguistic exchange between different groups of people up to the point of blurring linguistic boundaries. Hence, Blommaert argues: 'The fact is, however, that someone's linguistic repertoire reflects a *life*, not just birth, a life that is lived in a real sociocultural, historical and political space. If such a life develops in a place torn by conflict and dislodged social and political relations, the image of someone being born and bred in one community with one language as his 'own' is hardly useful. In fact, using such a pristine image is unjust.'[102]

Blommaert's empirical and theoretical analysis of language assessment in the context of the asylum procedure evidences, again, that the asylum seeker's credibility is predicated on our normative assumptions about human behavior. We can imagine a person speaking different languages -- because he studies abroad, has moved from one country to another, is a second and third generation immigrant, and so on. What we cannot imagine is that a person speaks a bit of different languages without being in full possession of one language (because he or she, for example, did not participate in the educational system of the country because he was constantly on the move) that constitutes the smooth thread that connects an individual to his origin. If an asylum seeker does not confirm our imaginations about language, he is simply incomprehensible and disqualified, and his claim deemed to be incredible or even malafide.[103]

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[102] Blommaert, J. 'Language, Asylum, and the National Order', *Current Anthropology*, vol. 50 (2009), p. 424.

[103] Blommaert pushes the point further, arguing that immigration authorities assume beforehand that the applicant is lying: 'If we accept that Joseph led the life he documents in his affidavit, then very little in the way of a 'normal' sociolinguistic profile can be expected … To put it more crudely, if the Home Office had assumed that Joseph *may* have been a genuine refugee, deviance from a 'normal' sociolinguistic profile would have been one of the key arguments in his favour. Imposing such sociolinguistic normalcy … amounts to an *a priori* refusal to accept the possible truth of his story.' (Ibid., p. 424).

The upshot of the analyses of Spijkerboer and Blommaert, both of which unravel normative assumptions at work in the process of refugee status determination, is that asylum seekers are constructed as refugees if and only if they live up to our expectations and confirm our normative views. If not, they are simply incomprehensible as refugees.

That normative imaginations and assumptions about human behavior are decisive for the asylum seeker's credibility, signals a grave intricacy for refugees. For, the ramification of 'how we do things' is that they have little if any influence on the selection, interpretation and assessment of the facts they present that are to substantiate their flight motives. As Spijkerboer puts it: 'Asylum seekers have little or no power to influence the manner in which decisions are made about them.'[104] The relation between the asylum seeker and the immigration authorities is, therefore, deeply asymmetrical. To be sure, this difference in power is not just due to failures in intercultural communication. Hence, Spijkerboer argues that the repercussions of normative assumptions will not be mitigated by training interview officials in intercultural communication. What is at issue is much more fundamental than that. Indeed, officials should be aware of the fact, Spijkerboer argues, that the 'communication between asylum applicants and interview officials will always take place against the backdrop of a considerable difference in power which is an obstacle to good communication … Training interview officials should not promote a feeling of now "know how to do it" but, rather, a feeling of uneasiness on account of the situation in which the interview takes place.'[105]

This book offers a persistent reflection on the asymmetrical relation between the asylum seeker and the receiving community. For now it is important, however, to sketch out the philosophical concern involved in the fact that asylum seekers are constructed as refugees if they meet our normative views on human behavior. Refugee status is conferred upon applicants who are like us. Put differently: Asylum seekers become comprehensible as refugees if we can recognize them 'as own.' *Underneath the distinction between the real, trustworthy, deserving refugee and the undeserving or even bogus claimant, the distinction between the own and foreign thus persists.* Contrary to the view that the admittance and inclusion of refugees challenges what and who we are as a people, our identity appears to be the very starting point from which we proceed in cases of asylum.[106] Not only do refugees affirm what we want to be by allowing us to uphold moral and humanitarian ideals. The self-assertion on the part of the receiving community extends beyond that. Indeed, as the terms under which an asylum seeker is recognized as a refugee are set up in advance, he or she also affirms the identity of the receiving community.

2.4 Givers and Takers: Good Refugees and Abusive Claimants

There is, however, yet another discourse that frames the challenge of asylum not in relation to collective identity but as a security issue. As already demonstrated in

[104] Spijkerboer 1999, p. 6.
[105] Ibid., p. 202.
[106] Cf., also Roermund, B. 'De rechter: grenswachter of grensganger?', in Broers & Van Klink (eds), *De rechter als rechtsvormer*, Amsterdam: Boom Juridische Uitgevers 2001, pp. 166-168.

Chapter One, asylum is perceived to constitute a security threat because of the system's liability to abuse by economic immigrants. The unauthorized presence of large numbers of immigrants upon a state's territory damages the proper functioning of democratic legal order. More precisely still, the trespassing of borders by those immigrants undermines the right a democratic people claims for itself to select and exclude non-nationals in its own interest.[107] In this security discourse, the challenge or threat does not come from the real refugee but is instead attributed to the economic immigrant who takes advantage of the system by lodging a fraudulent claim.

However, this logic of abuse is put in a wholly different light by virtue of the asylum procedure's reliability on the category of the own as opposed to the foreign. Additionally, the basic distinction between 'own' and 'foreign' also explains why return is not only relevant to rejected asylum seekers (which, as shown in Chapter One, spurred the debate on the prevention of abuse) but eventually spills over to *all* asylum seekers and refugees. There is, or so I will argue, a clear link between the own/foreign distinction as decisive for refugee status determination, the logic of the prevention of abuse, and the current exploration of extraterritorial asylum policies.

I will develop my argument on the basis of the aforementioned book by Bonnie Honig, *Democracy and the Foreigner*. I will proceed from the assumption that the normative assumptions on human behavior, by virtue of which the asylum procedure is reliant upon the own/foreign distinction, also influence the distinction between the real refugee, on the one hand, and the bogus claimant, on the other. This is not to deny, of course, that economic immigrants – for whatever good reasons they have in doing so – might seek to abuse the system with a view to illegal settlement in the receiving state. And, for the sake of nuance, the possibility should also be included that an application can be rejected without the claimant being cast as abusive. Admittedly, then, the distinction between the genuine refugee and the fraudulent claimant cannot be perfectly mapped onto the distinction between the own and foreign. But that both distinctions do fade into each other is evidenced by yet another divide that lurks behind the discourse on asylum and immigration. This is the divide, as laid bare and reflected upon by Honig, between givers and takers. Though Honig discerns the giver/taker divide with respect to foreigners and immigrants in general[108], her argument seems to be, in particular, apposite in relation to refugees.

As the 'real' refugee does not upset or unsettles us, but instead affirms who we are and want to be, he is a *good refugee*. Reinvigorating our identity, the real and good refugee is what Honig coins as a giver. The bogus claimant, by contrast, who imposes on our freedom and justice, is a taker who gives nothing in return. Causing our asylum system to be clogged, he imposes on our kindness and benevolence to offer asylum to those genuinely in need of international protection. And, so the reasoning goes, by offering himself to labor at a lower than minimum cost – which,

[107] For more on the relation between democratic legal order, security and irregular immigration see: 'Lindahl, H.K. 'Border Crossings by Immigrants: Legality, Illegality and Alegality', *Res Publica*, vol. 14 (2008), pp. 117-135.

[108] Honig develops the argument with respect to good givers and bad takers in her reading of the Biblical Book of Ruth. Cf., Honig 2001, pp. 41-72.

after all, was the ultimate aim of his false claim – he profits from our economy without giving anything in return.

Honig convincingly shows that in public discourse on immigration, immigrants are divided over two supposedly opposing positions. They are either good givers or bad takers[109]. So it is, too, with refugees. But this division over two supposedly opposing positions implies that, if the real refugee really is what we want him to be, he must occupy the position of a giver, steering away from everything that may make him suspect of being a taker. A case in point is the exclusion of refugees from free movement at the time of the abolition of the EU internal borders. As Elspeth Guild argues, 'it was the spectre of the refugee moving and gaining entitlements to rights'[110] that motivated this exclusion. Guild understands the creation of the Dublin system against the backdrop of this exclusion. That refugees were not to profit from the EU internal market, she argues, ultimately led to the upholding of internal borders for the purpose of determining which state is held responsible for refugee status determination.[111] In this respect, it is also important to bear in mind that, with a view to end the practice of 'asylum shopping', the rejection of an asylum seeker holds throughout the European Union, whereas recognition is nationally limited. Seen from the perspective of the giver/taker divide, the refugee is in no position to demand anything, as is evidenced by the fact that although 'an individual might have second degree family links or friends or job prospects in one Member State, but not in another, and thus wishes to apply for asylum in that Member State' this is nonetheless 'irrelevant to allocation of responsibility among the Member States under the Treaties.'[112] This already makes clear that the giver/taker divide is not simply in favour of the real refugee, and only puts the bad one at a disadvantage. As a number of authors have noted, the Dublin Convention is at the root of the strident position EU Member States take with regard to refugee protection, as it was the first damage inflicted to the legal position of refugees, and the throw-off of a deterioration that has increased ever since.[113]

Indeed, the binary opposition between givers and takers, good refugees and bad claimants, is equally detrimental to both. It disarms the good refugee, and arrests, so to speak, the intrusion of his arrival. Intrusion and disruption are instead attributed to the one who is said to deceive, abuse and take from us. Driven to the limit, however, the referred opposition implies, as said, that the real refugee must

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[109] Cf., Honig 2001, pp. 73-106.
[110] E. Guild (2006), p. 635.
[111] Cf., Ibid., p. 634.
[112] Ibid., pp. 636, 637.
[113] Cf. Guild (2004), pp. 198-218; G. Noll 'Formalism v. Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law', *Nordic Journal of International Law*, vol. 70 (2001) pp.161-182. In general, the Dublin system is perceived to offer states the opportunity to pool their responsibilities for refugee protection as an asylum claim can be judged to be inadmissible on account of the asylum seeker's first entry into a different Member State. On the basis of the Dublin system, the asylum seeker is to be returned to the country of first entry for his claim to be assessed. In the last few years this has caused the dire predicament of asylum seekers who have been returned to Greece which was their point of entry into the European Union. As numerous NGO's have stressed time and again, this violates the principle that refugees must have access to fair and equal procedures, as Greece does not have a proper functioning asylum procedure at all and recognition rates are close to nil. The practice of EU Member States to return asylum seekers to Greece constitutes indirect *refoulement,* as statistics indicate that the majority of asylum seekers in Greece are either detained under inhumane circumstances or are sent back to Turkey. The recent decision of the ECtHR on 21 January 2011, prohibited the return of asylum seekers to Greece (Cf., ECtHR M.S.S. vs. Belgium, and Greece, application no. 30696/09).

steer away from anything that may make him suspect of being a taker. He won't be allowed to work, for this would take away our jobs. He wouldn't be given proper housing, for this would take away all the beautiful houses we are entitled to, adding, moreover, to a housing shortage at our detriment. Nor would he be allowed to profit from social, economic, cultural and full health provisions, as we are the ones paying taxes for that. Hence, Nevzat Soğuk's astute observation that the 'incorporation' of refugees in our societies is at the same time a marginalization to keep refugees at a distance from the normal order of things and the possibilities it offers for a human life to flourish.[114]

Indeed, the logic of abuse spills over to all refugees. Seemingly willing to take refugees in, but under our own terms, we mistrustfully hunt down the traces of their intrusion, trying to repress it by keeping them at a distance, either by secluding them from the normal order of things or by preventing them to arrive at all. Indeed, the ultimate consequence of the division between good givers and bad takers as sketched above, pretty much resembles a regime of temporary protection with a view to return home, which, recall from Chapter One, figures in a discourse that ultimately seeks to disconnect protection from immigration. Temporary protection clearly evidences Honig's claim that hospitality is always fraught with hostility.

To sum up the argument: The real refugee is a real refugee on account of affirming the identity of the host state. Reinvigorating the collective identity of the receiving community, the real refugee is a good refugee. To ascribe to him the position of a giver implies that he must cleanse himself of the suspicion that he is a taker and is in no position to expect or demand anything. Driven to the limit, the real and good refugee is a refugee who must be protected elsewhere. Indeed, the giver/taker divide casts light on what we have been thinking and practicing all along. Hence, Soğuk argues :'The refugee is given a name only to be deprived of his ability to participate fully in the polity in which he finds himself … 'To exist again in more than a name', to have 'work', 'home', and 'decisions to take', the refugee must return 'home', that is, he must have his territorial ties reestablished …'[115].

To divide potential refugees over the two positions of either good givers who affirm who we are, or bad takers who abuse our freedom and justice, attributes, as said, the challenge of asylum to the bogus claimant. But, this veils the challenge inherent in *every* asylum claim. Indeed, from the viewpoint of challenging the receiving community, the distinction between good givers who deserve our hospitality and bad takers whom we approach with hostility, is simply false, as Honig also argues. Consider what happens if refugees live among us. They would learn the language, go to school, tie new social relations, fall in love, give birth to their children, find a job and so forth. That is, they will try and succeed to build their lives anew, regain a sense of belonging, worthiness and usefulness. But this implies that even the good refugee will be a taker, as he will be taking up his place in our society. Refugees want bread, but they want roses too.[116] And if the claim to

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[114] Cf., Soğuk, N. *States and Strangers. Refugees and Displacements of Statecraft*, Minnesota: University of Minnesota Press 1999, pp. 53, 54.

[115]

[116] 'We want bread, but we want roses too' was the slogan of the textile strike in Massachusetts in 1912, which united immigrant workers under the leadership of the Industrial Workers of the World. In the 1990's, the slogan was adopted again during the marches in Los Angeles of immigrant workers who resisted exploitation, bad payments and bad working conditions. Though 'Bread and Roses' has always been linked to struggles of

asylum is experienced to be challenging, unsettling or perhaps even threatening, it is not simply because the claimant might turn out to be a bogus one. Rather, it is challenging, as the refugee demands that we make and give place to him because he has no where to return.

Throughout this book I will frequently return to this challenge inherent in a claim to asylum so as to gain full understanding of the stakes involved in refugee protection. In the final chapter, I will explicate the implications of the loosening of the division between *de facto* and *de jure* statelessness in relation to the concept of asylum, proceeding from the very simple question: What is the refugee asking for in claiming asylum? For now, it suffices to say that the claim to asylum challenges the receiving community, as it calls for a redistribution of legal places that are provided for within a given polity. It is not, that is, the abusive, illegal-- let alone criminal-- act of the foreign outsider who is trespassing our boundaries. Rather, it is the transgressive act of the stranger coming from an undetermined, irreducible outside that calls for the ordering anew of our polity.

2.5 Conclusion

Let me try and sum up the argument. As argued in the section above, in order to qualify as a refugee, the asylum seeker must assume the norms and expectations the members of the receiving polity hold in common so as to make human behavior comprehensible. Sure, the refugee is certainly the one who differs from us, yet this difference is safely captured in the categories that are familiar to us, to wit the categories that determine what is foreign and what is not. The refugee might bring with him foreign contents of experience, but the point of the matter is that for these experiences, determining rules exist.[117] So the refugee, instead of shattering existing structures of human experience, affirms who we are, and is therefore a good refugee. As our identity sets the terms for refugee recognition, the refugee, to borrow from the French philosopher, Jean Luc Nancy, 'is awaited and received without any part of him being unwelcome.'[118] But, as we receive the refugee by effacing his strangeness on the threshold, we are not, in fact, *receiving* him.[119] As Jacques Derrida puts it: 'If I welcome only what I welcome, what I am ready to welcome, and that I recognize in advance because I expect the coming of the *hôte* (guest) as invited, there is no hospitality.'[120] Indeed, by way of affirming the identity of the receiving community, the refugee's strangeness is effaced, his intrusion arrested. But as Nancy remarks, the arrival of the stranger always

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immigrant workers, and hence, to economic immigration, it seems particularly apposite to the issue of asylum, as 'the roses' express 'a sharing of life's glories' as the poem 'Bread and Roses' of James Oppenheim has it. In fact, the slogan 'We want bread but we want roses, too', derives from this poem written in 1911.

[117] To develop this argument I benefited from Waldenfels' reflection on the own and foreign and manifestations of the inside/outside divide. Cf., Waldenfels, B. *Order in the Twilight* (translated from the German), Athens, Ohio: Ohio University Press 1996, pp. 76, 77.

[118] Nancy, J.L., 'L'Intrus', *The New Centennial Review*, vol. 2, 2002, p. 1.

[119] Cf. Ibid., p. 2.

[120] Derrida as cited in Dikec, Clark, Barnett, 'Extending Hospitality: Giving Space, Taking Time', *A journal of Modern Critical Theory. Special Issue Extending Hospitality: Giving Space, Taking Time*, vol. 32 2009, p.42.

necessarily carries within itself something of the *intruse,* 'otherwise the stranger loses his strangeness.'[121]

As argued in the first sections of this chapter, the refugee's strangeness – which, recall, made him a legal anomaly in the years preceding the Refugee Convention – stems from his displacement. Displacement signals the refugee's lack of an own legal place, as he falls outside the distribution of places that allocate an individual to a state. The refugee is neither there nor here, but is instead, nowhere. Indeed, the absolutely desperate experience of being a refugee is to belong absolutely nowhere in this world. The refugee, therefore, does not come from a *foreign place* but from a *strange place* that is irreducible to a qualified 'there' that is determined over against a particular here. Coming from a strange place, having no where to return, the refugee asks and demands that we make and give place to him. For this very reason, the arrival of the refugee always poses questions, is always experienced to be challenging.

But as said, this challenge is neutralized, and the refugee's strangeness erased. This is ultimately achieved by the concept of *de facto* statelessness that offers the conceptual terms that frame current understanding of the refugee question. *De facto* statelessness underpins the general and stubborn inclination to the argument that refugees belong there, not here. But as argued, *de facto* statelessness secrets displacement, veils that the 'there' where the refugee supposedly belongs is no longer self-evident as the refugee's own and proper place. Instead, the there where he supposedly belongs, collapses into a 'no matter where as long as it is not here.'

It comes as no surprise, therefore, that what is supposed to be the human face of sovereign power, i.e., the protection of those who are not part of the sovereign people, is always prone to show the deathly pale face of a sovereign power that frenetically, and at times even violently, tries to shield itself from those who show it their weakness and vulnerability. For, as demonstrated in this chapter, there is a clear limit to the reasoning that refugees belong there, not here. At this limit, the non-existent homeland of the refugee collapses into the camp. The camp signals the recurrence of the refugee's strangeness, causing him again to become an anomaly in the international legal community, as it gives a spatial arrangement to displacement. Instead of responding to the desperate experience of belonging nowhere in this world, the camp affirms that the refugee does indeed not belong in this world.

Note, however, that at the limit of *de facto* statelessness, strangeness not only pertains to the refugee, but also recoils upon us, as well. Strangeness recoils as we – who like to believe to be good to refugees as is evidenced by the frequent declaration of EU Member States to be fully committed to the 1951 Refugee Convention[122] - cannot possibly view this final solution to be our own. Indeed, the ultimate attempt to repress the refugee's displacement by way of giving a spatial arrangement to it, seriously puts doubt upon our proclaimed belief in human rights and our commitment to protection obligations under the Refugee Convention. The setback of strangeness is equally evidenced by the increasingly unsavory means to which we resort in order to deflect refugees and keep them at bay, causing refugees to become trapped in movements of illegal immigration. In her examination of

[121] Nancy (2002), pp. 1-2.
[122] Cf. Guild (2004), pp. 199, 200.

how refugee protection obligations have been affected by the integration of the European Union and the harmonization of asylum policies, Guild, as we already saw in Chapter One, expresses her strong opinion on the matter: 'It is difficult not to be shocked by the current situation.'[123] Guild intimates that strangeness recoils upon us, as we cannot possibly recognize the means to which we resort to be our own.[124] Discerning a growing discrepancy between EU policy and practice, on the one hand, and the fundamental values as enshrined in the Charter on Fundamental Rights, on the other, she develops an argument that cautions against the recourse to increasingly undemocratic means, as these are ultimately damaging to the European demos itself: 'The current climate of exclusion and avoidance of responsibility is, unfortunately, likely to result in a potentially damaging challenge before the European Court of Human Rights. If that Court should determine that the standards which it has set out as necessary for the Member States to comply with article 3 of the ECHR (the prohibition of torture, including return to torture) are not reflected in the relevant EU legislation, the EU's authority in this field will be deeply compromised.'[125]

Present failures in refugee protection are generally explained by the reluctance states exhibit to meet their obligations towards refugees. Indeed, those on the lookout for refugee rights usually deploy the following argument to explain the downfall of protection: Though refugee law constitutes a humanitarian exception to the sovereign right to select and exclude non-nationals at the borders of a state, states shirk their responsibility as they continue to insist on their sovereignty.

Importantly, however, the analysis of the conceptual presuppositions of the current international refugee protection regime intimates that present failures cannot simply be attributed to the reluctance of states. What is at issue is much more fundamental than that. The upshot of the analysis presented in this chapter is that sovereignty, indeed, crops up whenever refugee protection is at issue, albeit for different reasons. My inquiry revealed that the international refugee protection regime is rooted in the basic distinctions between here and there, and own and foreign. Both distinctions are manifestations of the inside/outside divide that is constitutive for sovereign self-determination and self-rule. This refutes the claim that refugee protection constitutes an exception to the right to select and exclude non-nationals, which is ingredient to sovereign self-determination and self-rule. Therefore, I submit that refugee protection does not fetter sovereign power, but instead brings it right back into focus. Consequently, if there is a need to rethink the basis of our asylum policies, we should proceed from a precise reflection on the concept of popular sovereignty. The question, therefore, that motivates this entire

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[123] Guild (2006) p. 631.

[124] Referring to the 'spaces of exception' in which asylum seekers and immigrants are held pending their removal from the territory of the European Union, Lindahl argues: 'By undoing the concrete unity of territoriality, such that what remains is its purely physical substrate, a parallel detachment takes place with respect to the migrant, who, divested of her/his status as a legal subject, becomes a human being who can lay claim to nothing more than the 'abstract nakedness of being human.' What had been a legal power now comes to stand, as naked power, over against this abstract nakedness. Accordingly, in the same move by which a legal community dis-owns part of its territory, the community's legal officials cease to be such in their treatment of migrants: to dis-own a place is to disavow the acts that occur therein as acts of legal officials, bringing to halt the self-reference of a legal community, hence the possibility of democratic self-government.' (Lindahl (2004), p. 383).

[125] Guild (2006), p. 650.

book is: What concept of popular sovereignty makes it intelligible for a democratic We to become responsive to the right to asylum as claimed by refugees? Why would we, members of democratic polities, care to protect refugees?

3

Refugees and the Right to Have Rights

In Chapter One, I discussed the legal sources of the international protection of refugees, showing that, while the 1951 Refugee Convention is still considered to be the central pillar of the protection edifice, international human rights law has become an important factor in it, as well. At the same time, however, increasingly restrictive measures of immigration control counterbalance the expansion of international protection. Both developments seem caustic, and are proof of the tension – and at times even outright contradiction – between democracy's adherence to universal human rights and the sovereign right of a people to determine itself and strengthen its borders.

In this chapter, I will discuss the various attempts to mitigate the tension between democracy and human rights with regard to refugeeship. The *locus classicus* of these efforts is Hannah Arendt's line of argument, which may be captured in the core phrase of 'the right to have rights'. I will start with an explanation of this phrase in the broader context of her work. Then I will turn to the contemporary debate on the implications of Arendt's thought, as launched, in particular, by Seyla Benhabib's *The Rights of Others. Aliens, Residents and Citizens* (2004). Benhabib proceeds from the tension between the sovereign right of the people to determine a legal space of their own, on the one hand, and the human right of refugees to find themselves a legal place of their own, on the other. She understands this tension to be a key element in a democratic response to the right of others to seek and be granted membership in communities to which they do not yet belong. Mediating between the rights and interests of both immigrating refugees and receiving states, Benhabib offers a theoretical basis for two common assumptions that ring out in debates on immigrants and refugees. First, the assumption that democratic collective identity is not predetermined and fixed, and second, that immigrants and refugees have a moral right to admission and membership.

However, I will take issue with the conclusiveness of her argument by analyzing its presuppositions, in particular, the presupposition of moral universalism underlying her 'discourse-theoretical' approach. This critique is inspired, to a large extent, by Bonnie Honig's writing, targeting the idea of reciprocity between the members of a polity and those who come to its doorstep. But in the end, I will

show that even this critique does not capture with sufficient rigor what the challenge inherent in a claim to asylum amounts to. The crucial point here will be how we have to think 'facticity' – a notion that governs the basic structure of this chapter from the starting point with Arendt's key concepts of nationality and natality, over Habermas's (hence Benhabib's) idea of *Faktizität* (from Between Facts and Norms), to Honig's analysis of proximity.

3.1 The Crisis of Human Rights

As already said in the previous chapter, Arendt's *The Origins of Totalitarianism,* offers a thought provoking reflection on the refugee problem that troubled Europe in the first half of the Twentieth Century. Her invocation of a right to have rights has particularly exerted great influence on the debate on immigration, the *sans papiers*, the stateless and refugees.[1] The right to have rights is Arendt's response to what she believes to be the radical crisis of the concept of human rights.

Arendt's critique of human rights is twofold. First of all, she discerns an unfortunate collapse of human rights into the rights of citizens belonging to a state. Though human rights affirm the dignity and freedom of the individual over against the state so as to protect the individual against the injustices, violence and arbitrariness of state authorities, the state is, nevertheless, the prime distributor of these rights. Consequently, even though human rights are said to be universal and inalienable, it proved to be a difficult, if not impossible, task to establish the rights of those who had lost the protection of their home government and fled their own countries. No one, Arendt observes, was 'able to define with any assurance what these general human rights, as distinguished from the rights of citizens, really are.'[2] The drawback of the coincidence between human rights and citizens' rights is that

[1] Cf., Agamben 1998, pp. 126-135; Balibar, E. 'Violence, Power, Democracy -Outlines of a Topography of Cruelty. Citizenship and Civility in the Era of Global Violence', *Constellations. An International Journal of Critical and Democratic Theory*, vol. 8 (2010), pp. 15-29; Beltrán, C. 'Going Public: Hannah Arendt, Immigrant Action, and the Space of Appearance', *Political Theory*, vol. 37 (2009), pp. 595-622; Borren, M. 'Towards and Arendtian Politics of In/Visibility: on Stateless Refugees and Undocumented Aliens', *Ethical Perspectives,* vol. 15, (2008), pp. 213-237; Honig, B. *Emergency Politics. Paradox, Law, Democracy*, Princeton/Oxford: Princeton University Press 2009, pp. 112-137; Krause, M. 'Undocumented Migrants: An Arendtian Perspective', *European Journal of Political Theory*, vol. 7 (2008), pp. 331-348; Schaap, A. 'Enacting the Right to Have Rights: Jacques Rancière's Critique of Hannah Arendt', *European Journal of Political Theory*, vol. 10 (2011), pp. 22-45.

[2] OT, p. 293. Importantly, Arendt points out that the practice of asylum is some evidence of the effectiveness of human rights outside the context of the nation-state. The practice of asylum for political refugees, however, completely broke down in the face of Europe's new refugees: 'By itself the loss of government protection is no more unprecedented than the loss of home. Civilized countries did offer the right to asylum to those who, for political reasons, had been persecuted by their governments, and this practice, though never officially incorporated into any constitution, has functioned well-enough throughout the Nineteenth Century, and even in our century. The trouble arose when it appeared that the new categories of the persecuted were far too numerous to be handled by any unofficial practice destined for exceptional cases. Moreover, the majority could hardly qualify for the right of asylum, which implicitly presupposed political or religious convictions which were not outlawed in the country of refuge. The new refugees were persecuted not because of what they had done or thought, but because of what they unchangeably were – born into the wrong kind of race or the wrong kind of class, or drafted by the wrong kind of government … [T]he first glaring fact was that these people, though persecuted under some political pretext, were no longer, as the persecuted had been throughout history, a liability and an image of shame for the persecutors; that they were not considered as, and hardly pretended to be, active enemies …, but that they were and appeared to be nothing but human beings whose very innocence – from every point of view, and especially that of the persecuting government – was their greatest misfortune.'

the former lack any reality absent the latter: 'The Rights of Man, supposedly inalienable, proved to be unenforceable – even in countries whose constitutions were based upon them – whenever people appeared who were no longer citizens of any state.'[3]

The calamity of refugees was not that they were not treated as nationals by the state responsible for their protection, as was the case with minorities who -- bad enough in itself--often suffered from injustice and arbitrariness. The predicament of the refugees was that they found themselves in a situation of complete rightlessness: 'The calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion – formulas which were designed to solve problems *within* a given community – but that they no longer belong to any community, whatsoever. Their plight is not that they are not equal before the law, but that no law exists for them; not that they are oppressed, but that nobody even wants to oppress them. Only in the last stage of a rather lengthy process is their right to live threatened; only if they remain perfectly "superfluous", if nobody can be found to "claim" them, may their lives be in danger … The point is that a condition of complete rightlessness was created before the right to live was challenged.'[4]

According to Arendt, the inability of states to deal with refugees testified to the breakdown of human rights. Human rights either accrue to the citizen, in which case they lack any distinguishing feature; or, they pertain to the human being, in which case they hang in the void. Arendt empathically argues that human rights, 'based upon the assumed existence of a human being', fell apart when Europe was confronted with refugees who had lost everything 'except that they were still human.' The world, however, 'found nothing sacred in the abstract nakedness of being human.'[5]

Arendt's second point of criticism is targeted against the supposed existence of a naked human being. The breakdown of human rights also debunks the assumption of a timeless human being whose freedom, dignity and equality are inherent in the natural or biological fact of being born a human. More precisely still, the crisis puts doubt on what Agamben coins as the fiction of 'the continuity between man and citizen, nativity and nationality'.[6]

Nativity certainly has a long- standing tradition in matters of nationality, as it predicates nationality either upon birth in a given territory (*ius soli*) or birth in a particular ethnic community that hands nationality down through the bloodline (*ius sanguinis*). [7] Yet the principle of nativity is certainly not conclusive. It does not

[3] Ibid., p. 293.
[4] Ibid., pp. 295, 296.
[5] Ibid, p. 299.
[6] Compare Agamben 1998, p. 131: 'If refugees (whose numbers have continued to grow in our century to the point of including a significant part of humanity today) represent such a disquieting element in the order of the modern nation-state, this is above all because by breaking the continuity between man and citizen, *nativity and nationality*, they put the originary fiction of modern sovereignty in crisis. Bringing to light the difference between birth and nation, the refugee causes the secret presupposition of the political domain – bare life – to appear for an instant within that domain. In this sense, the refugee is truly 'the man of rights', as Arendt suggests, the first and only real appearance of rights outside the fiction of the citizen that always covers them over. Yet, this is precisely what makes the figure of the refugee so hard to define politically.'
[7] Though states, as of old, adhere to the doctrines of *ius soli* and/or *ius sanguinis*, Weis points out that nationality is not, for that matter, a simple biological-historical term. First and foremost, nationality, he

explain, for example, the injunction that no one be deprived of the right to change his or her nationality as stipulated in article 15 of the Universal Declaration of Human Rights. Also, the description of nationality by the International Court of Justice in the famous Nottebohm case (1953) rebuts the view that nationality is solely predicated on birth. Nationality, the ICJ expressed, 'is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests, and sentiments.'[8] As Van Waas explains, many factors may serve as evidence for this 'genuine connection' such as, indeed, place of birth or descent, but also marriage, family ties, language and so on which allow for the attribution of nationality on the basis of *ius domicile.*[9]

Clearly, then, nationality is not unequivocally linked to 'birth' and 'origin.' Indeed, recall from Chapter Two that nationality enables an individual to dwell in his or her own country. In its General Comment on Freedom of Movement (1999) the Human Rights Commission has made it perfectly clear that 'one's own country' does not of necessity coincide with 'country of origin': 'The scope of 'his own country' is broader than the concept of 'country of nationality.' It is not limited to nationality in the formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to, or claims in relation to, a given country, cannot be considered to be a mere alien.'[10]

Indeed, the very expression 'one's own country' already calls into question that nativity is the one and only principle of nationality. It suggests that in matters of nationality, what might be called the principle of natality is of equal importance.[11]

Drawing on Arendt, the principle of natality reflects that what makes us human is not the simple, biological fact of being born a human, but rather, the symbolic fact that our birth marks a new beginning in this world. This she had learned from St. Augustine, who writes that 'in order that there be such a beginning, man was created before whom nobody was.' In her dissertation of 1929, Arendt comments on St. Augustine's phrase, arguing that 'the beginning that was created with man prevented time and the universe as a whole from turning eternally in cycles … without anything new ever happening. Hence, it was for the sake of *novitas,* in a sense, that man was created.'[12]

Our 'first' birth subjects us to the necessities of biological and reproductive life, condemning us, that is, to 'turning eternally in cycles.' But, our second and symbolic birth makes us free.[13] Natality is, therefore, the principle of human freedom and action. Capable to 'act as a beginner' and 'to enact the story of

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argues, is a politico-legal term denoting membership in a particular state that is responsible for granting rights and duties (Cf. Weis 1979, pp. 1-3).

[8] As cited in Van Waas 2009, p. 32.

[9] Cf., ibid., p. 32.

[10] As cited in: Van Roermund, B. 'Migrants, Humans and Human Rights: The Right to Move as the Right to Stay', in Lindahl, H.K. ed., *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice*, Oxford: Hart Publishers 2009, p.166.

[11] Van Roermund notes that the predicate 'nationality' can easily be misunderstood as a gateway to nationalism. Therefore, he proposes to follow Arendt in her elaboration of the principle of natality which is to illuminate, Van Roermund argues, the concept of one's own country (Cf., Ibid., p. 170).

[12] Arendt, H. *Love and Saint Augustine* (translated from the German*),* Chicago: University of Chicago Press 1996, p. 55.

[13] For an interpretation on the difference between our 'first' and 'second' birth in the work of Arendt see: De Schutter, D. *Een keters begin. Arendt's filosofie over het actieve leven*, Budel: Damon 2005.

mankind', human beings, according to Arendt, never simply are, but rather 'human existence consists in acting and behaving in some way or other.'[14] Our second symbolic birth is, therefore, far more significant than our biological birth which roots us in a territory or fixes us in a bloodline. It is due to our second birth that we are able to disclose ourselves in words and deeds to others.[15] Our entrance into the world of public life is, therefore, borne by natality. Natality enables us to share a world together with others of our kind. By virtue of natality, it can be argued, we have a place of our own within this world. Moreover, our acting and speaking together with others is the precondition of our having rights. The rights we have, Arendt argues, are not given to us by birth, but are the outcome of our joint political action: 'Equality, in contrast to all that is involved in mere existence, is not given to us, but is the result of human organization insofar as it is guided by the principle of justice. We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights.'[16]

3.2 The Right to Have Rights

So, Arendt's rebuttal of human rights is twofold: They lack any effective reality if not backed up by membership in a political community, and at the same time, dislodge the human from everything that makes life human, muting those who are suffering from the abstract nakedness of being nothing but human. Both points of criticism are reflected in Arendt's famous formulation of a right to have rights: 'The fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective… This extremity, and nothing else, is the situation of people deprived of human rights. They are deprived, not of the right to freedom, but of the right to action; not of the right to think whatever they please, but of the right of opinion. We became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation.'[17]

Here, Arendt captures one important aspect of the plight of refugees: Deprived of a place in the world, whatever refugees say or do does not matter. They are not perceived, but remain invisible. Denied the relevance of speech and rendered completely powerless, refugees are without a world in the thorough political sense in which Arendt understands the notion of a world. A world is what emerges between us whenever we share with others our own view of the world. A world is

[14] Arendt 1996, p. 53.
[15] Compare Arendt, H. *The Human Condition. A Study on the Central Dilemmas Facing Modern Man,* New York: Doubleday Anchor Book 1959, p. 157: 'With word and deed we insert ourselves into the human world, and this insertion is like a second birth, in which we confirm and take upon ourselves the naked fact of our original physical appearance.'
[16] OT, p. 301.
[17] Ibid. pp. 296, 297.

the *in- between* that connects and separates us;[18] it is what we have in common and what we share by exchanging our opinions and views which are always unique. It is this intricate interplay between commonness and uniqueness, between plurality and singularity, that make up a world and enables us to inhabit a world.[19] The most fundamental dimension of the world is, therefore, the public space; that is, 'the space where I appear to others as others appear to me.'[20] The meaning of this public realm is political freedom which is guaranteed by the equality between those who appear in it. Importantly, Arendt understands equality primarily as 'that all have the same claim to political activity', which takes 'the form of speaking and acting with one another.'[21] The crucial point of political freedom, Arendt argues, 'is that it is a spatial construct.' Therefore, the refugee who is forced to leave his home community not only loses his fatherland, 'but also he loses the only space in which he can be free – and he loses the society of his equals.'[22]

Though refugees are, thus, without a world, it is far too quick to limit their plight to their exclusion from the public realm. In the vast literature on the right to have rights there is a general tendency to derive the meaning of this right from the refugee's exclusion from the public realm and, hence, interpret it as a right to political action.[23] The argument heavily relies on Arendt's later work on the human condition and the distinctions she draws between the public realm and the private sphere, and between political freedom and the subjection to the necessities of natural life. The two parts of the disjunction that refugees are deprived of a place in the world and are suffering from the abstract nakedness of being nothing but human, have been believed to be conceptually linked to the exclusion from the public realm and the ensuing condemnation to the silence and darkness of a private existence.[24]

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[18] Cf., Arendt, H. *Men in Dark Times*, London: Jonathan Cape 1970, p. 4.

[19] Compare Arendt, H. *The Promise of Politics* (ed. Kohn, J., translated from the German), New York: Schocken Books 2005, p.93: 'Politics is based on the fact of human plurality. God created *man*, but *men* are a human, earthly product, the product of human nature … Politics deals with the coexistence and association of *different* men.' Cf., also Arendt 1959, p. 156.

[20] Arendt 1959, p. 177.

[21] Arendt 2005, p. 118.

[22] Ibid., p. 119.

[23] Cf., note 35 above.

[24] In her account of Arendt's politics of (in)visibility, Borren, for example, seems to express this view. Elaborating on the distinction between the private sphere and the public realm, Borren argues that visibility belongs to the latter where we appear and disclose to others who we are, whereas invisibility is 'good' for the former. In the private sphere, we live by what is given to us by mere existence, such as the passions of our hearts and souls, our caring, loving, and so forth. This has to remain invisible, protected against the public eye. Having formulated public visibility and private or natural invisibility to be the conditions of 'sound political action', Borren goes on to argue that public invisibility and natural visibility qualify as two 'two pathologies of the political' (Cf., Borren (2008), p. 224). According to Borren, both pathologies characterize the dire predicament of refugees and undocumented aliens. Both pathologies seem to imply that they are excluded from the public realm and thus denied their dignity without, moreover, being able to find reassurance in their private existence. Nevertheless, Borren holds that the two pathologies of the political are most notably detrimental to political action. Consequently, she argues that denial of access to the public realm, i.e., the loss of a place in the world that makes opinions significant and actions effective, is the *essence* of statelessness (Cf., Ibid,, p. 217). As predominance is given to public invisibility, Borren is able to contend that current strategies of self-obscuring practiced by illegal immigrants in their attempt to hide from the authorities, would have been *incomprehensible* to Arendt. But, Arendt was very well aware of the fact that refugees not only lost a place in the world where they could appear and share the world with others, but that they had lost their homes, as well. She knew that before anything else, they had to suffer the dreadful problem of where they had the right to live.

True, in *The Origins,* Arendt indeed asserts that the refugee is reduced to his mere existence. And mere existence, Arendt goes on to explain, is 'all that is mysteriously given to us by birth and which includes the shape of our bodies and the talents of our minds' and that can only be adequately dealt with 'by the unpredictable hazards of friendship and sympathy, or by the great and incalculable grace of love, which says with St. Augustine, '*Volo ut sis'* (I want you to be), without being able to give any particular reason for such supreme and unsurpassable affirmation.'[25]

Though sympathy, friendship, love and charity are adequate ways to deal with mere existence, the balefulness of the refugee's condition is precisely that he is entirely delivered over to such an ethical sense of those who are near in the absence of a law that protects him. 'The prolongation of their lives', Arendt says, 'is due to charity and not to right.'[26] And, it is great risk to bet on charity. For, the reduction to the natural givenness of mere existence not only makes the refugee dependent upon sympathy, charity or even an a-political humanitarianism, but equally exposes him to hostility, violence and abuse with impunity.[27]

Indeed, the refugee's loss of a political community willing and able to grant him rights does not boil down to his exclusion from the public realm, which supposedly forces him into invisibility behind the four walls of his private existence. The dire predicament of refugees is much more severe. Wherever he remains, he fears the nocturnal knock on the door by the authorities who will tell him that he does not belong here (not even in his own house) and who are eager to arrest and detain him. The plight of the refugee is not only that he is without a world in the thorough political sense Arendt ascribes to it, but also – and more disturbingly – that he is nowhere in this world. He is not only suffering from the silence and darkness of his private existence, from his inability to move to political action, but also he faces the dilemma that he has no right to live anywhere. Slavery, Arendt asserts with the usual lack of tact that distinctively marks her, was bad. But in any case, slaves were still needed; they still had their own place within the world. '[In] the light of recent events', Arendt, therefore, argues, 'it is possible to say that even slaves belonged to some sort of human community: Their labor was needed, used and exploited, and this kept them within the pale of humanity. To be a slave was, after all, to have a distinct character, a place in society – more than the abstract nakedness of being human and nothing but human.'[28] Both the slave and the refugee are not free; both are denied the opportunities for their emancipation, and deprived of the power to fight for their freedom. But, unlike the slave, the refugee is not even subjected to the necessities of biological, reproductive life. The refugee is rendered completely useless, made entirely superfluous,[29] -- and even though Arendt has always been hesitant to define radical evil, she believes that making people superfluous is the greatest evil of all.[30] To be uprooted, Arendt holds, is to

[25] OT, p. 301.
[26] OT, p. 296.
[27] Cf. also Agamben 1998, p. 174.
[28] OT, p. 297.
[29] Zygmunt Bauman also expresses the view that refugees are of no use at all in this world, and that their lives are wasted. Cf., Bauman, Z. *Wasted Lives: Modernity and its Outcasts*, Cambridge: Polity 2004.
[30] Compare Arendt, H. & Jaspers, K. *Correspondence 1926-1969* (ed. Kohler, L & Saner, H., translated from the German), New York/San Diego/London: Harcourt Brace Jovanovich Publishers 1992, p. 166: '[W]e know

lack a place in this world which is recognized and guaranteed by others. It is the preliminary condition for superfluity, which means, not to belong to the world at all.[31]

I, therefore, submit that it is far too quick to interpret the right to have rights as a right to political action and participation in the public space. Not only would this distort the understanding of the plight of refugees, but also it would miss out on the fundamental dilemma the right to have rights evokes. The right to have rights highlights that the refugee is without a world at the same time that he is nowhere in this world; it signals the deprivation of the refugee's life of public appearance, as well as his situation of complete rightlessness. The conceptual question the right to have rights evokes is, therefore: How is the refugee to claim a *right* to have rights while he is excluded from the *rights* that give *us* the equal claim to political activity, and that enable us to appear and stand up for our rights? Indeed, if we are not borne equal but become equal by virtue of our decision to mutually grant ourselves rights, that is, if our rights are the result of our political action, how can we hear the claim to a right to have rights by those who are without a voice? At the very least, the political reciprocity by virtue of which *we* are equal seems to imply a fundamental asymmetry between the receiving community and the refugee. If there is no 'We' between the refugee and the receiving state, how can he or she claim to be admitted to and belong to this very political community? As I will show below, Benhabib tries to put the pieces of this puzzle together.

3.3 Between Hospitality and Membership

In *The Rights of Others,* nationality matters are taken to a different level as Benhabib approaches the question of membership from the perspective of large scale movements of people across state borders. Membership and nationality matters are no longer issues that affect singular nation-states alone, but have become an urgent aspect of world politics and a key issue in the question of global justice.[32]

As immigration raises the question of membership, it would be inadequate to frame immigration as a matter of hospitality that is principled on the cosmopolitan ideal of 'world citizenship.' Indeed, if Benhabib were merely concerned for this cosmopolitan ideal, her reflection on, and contemporary interpretation of, Immanuel Kant's right to hospitality would do. As is well known, the right of hospitality is formulated as the third definitive article of Kant's *On Perpetual Peace* (1795), and states that 'the law of world citizenship shall be limited to conditions of universal hospitality.'[33] True, Kant's claim that states are not allowed to dispel a foreigner if this would lead to his destruction, draws on the traditional right of

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that the greatest of all evils, or radical evil, has nothing to do anymore with such humanly understandable, sinful motives. What radical evil really is I don't know, but it seems to me it somehow has to do with the following phenomenon: making human beings as human beings superfluous (not using them as a means to an end, which leaves their essence as humans untouched and impinges only on their human dignity; rather, making them superfluous as human beings).'

[31] Cf., OT p. 475.

[32] Cf., Benhabib 2004, p. 2.

[33] Kant. I. 'Perpetual Peace. A Philosophical Sketch.' in Reiss, H., ed. *Kant: Political Writings,* Cambridge: Cambridge University Press 1994, pp. 99-108.

states to grant asylum to a foreigner whom they refuse to extradite to a state which wants them back for punishment. It might even be interpreted, as Benhabib suggests, as an early version of the prohibition of *refoulement*. Yet, Kant's reflections on universal hospitality seem particularly apposite for current debates on cosmopolitanism, travel and temporary and economic migration. Kant limits hospitality to a right of temporary sojourn [*Besuchrecht*], and argues that a right to permanent stay [*Gastrecht*] requires a *Wohltätiger Vertrag* between the visitor and the state. The limitation of hospitality to temporary sojourn reflects the cosmopolitan ideal of exploring the free world and seeking contact with one's fellow 'world citizens.'

But the issue of asylum has little if anything to do with this cosmopolitan ideal. Indeed, the right to have rights brings to awareness that to live in the world does not mean to be at home just about everywhere in the world, but to have a legally sealed place within this world. The right to have rights underscores, as Benhabib would say, the ongoing 'significance of membership within bounded communities'.[34] It highlights, that is, that membership is always spatially bounded.

The spatiality of membership sets the stage for the dilemma that democratic states and refugees face when facing each other. For the spatiality of membership signals that state borders, first of all, separate members from non-members and determine who belongs and who doesn't. Evidently, state borders are not reducible to a geographical line that delimits a territory.[35] Rather, state borders are, as Benhabib puts it, as much civic as they are territorial.[36] Territoriality is, therefore, bound up with democratic closure: 'Precisely because democracies enact laws that are supposed to bind those who legitimately authorize them, the scope of democratic legitimacy cannot extend beyond the *demos* which has circumscribed itself as a people upon a given territory.'[37]

So, in the same vein that the individual's enjoyment of rights and freedom is spatially bounded, so too is the freedom of a given people spatially limited,[38] which is but another way of saying that the inside/outside divide is constitutive of democratic legal order. For the inside/outside divide to become manifest, it colors as a here and a there, materializes into the own and foreign. What is our own takes place and materializes into a here that we, the members of this polity, view to be our own place by virtue of the values we hold in common.[39]

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[34] Benhabib 2004, pp. 2, 3.

[35] In this respect, it is interesting to note that the field of political geography has evolved from focusing on geographical demarcation, the physical line so to speak, to studying borders as constituting and representing differences in space. As Van Houtum captures this shift, 'the border is now understood as a verb, in the sense of bordering.' (Van Houtum, H. 'The Geopolitics of Borders and Boundaries', *Geopolitics*, vol. 10 (2005), p. 672).

[36] Cf. Benhabib 2004, p. 1. And Ibid., p. 45.

[37] Ibid., p. 219.

[38] Arendt, too, highlights that the people's freedom is necessarily spatially bounded. If, in democracy, self-legislation is to be understood as the free act of a people to determine and govern itself, this implies that a people's freedom is always bounded: '[L]aws are the positively established fences which hedge in, protect, and limit the space in which freedom is not a concept, but a living, political reality.' (Arendt, 'Karl Jaspers: Citizen of the World?', in: Arendt, *Men in Dark Times*, Jonathan Cape, London, 1968, pp. 81, 82.**)**.

[39] Compare Lindahl, H.K. 'Give and Take: Arendt and the *Nomos* of Political Community', *Philosophy and Social Criticism*, vol. 32 (2006) p. 888: '[t]o close off a space is to qualify this space as an own territory. Hence, *by closing itself off as an inside with respect to an outside, a community posits a territory as its own, and vice versa.* An inside and an own territory are two sides of the same coin.'

Importantly, the outside, with respect to which an inside is limited, is not undetermined. At the other side of the border we do not encounter an empty space. Instead, we enter upon the territory of a different state. Lindahl captures the meaning thereof when he argues that borders not only *separate* an inside from an outside, but also *unite* what they separate into an encompassing whole. Without uniting what borders separate, there would not be a foreign country beyond our borders, but a desert in which the polity that has closed itself off would be like an island of peace and freedom. By the same token, the other would not be a foreigner belonging to another state, but a barbarian. To say that borders unite what they separate is to say that we live in a *common world* in which each and every individual has a place of its own.[40]

Thus, to live in the world means, first of all, to have a legally sealed place within this world. It is from this place and out of it that the free world can be explored. Indeed, recall from Chapter Two that the right to free movement is a function of nationality. The cosmopolitan ideal of being at home just about everywhere in the world is, therefore, not precluded by the fact of nationality. In fact, it is my legal membership in a political community that allows and enables me to leave home and travel the world. It, therefore, makes little sense to stage 'world citizenship' or 'cosmopolitan citizenship' as the opposite of spatially limited membership. Rather, the opposite of being at home everywhere is not to have a place of one's own somewhere, but to be nowhere.[41] This, recall, is the absolutely desperate experience of refugees. Indeed, according to Arendt refugees are forced to live outside the common world.[42] They, therefore, challenge the very assumption that we live in a common world.

It is against this backdrop that Benhabib establishes a right to membership of 'others' (thus pertaining to immigrants and refugees alike) in communities to which they do not yet belong. She gives both an empirical, or institutional, and theoretical justification for this right to seek and be granted membership. On an institutional reading, this right derives, Benhabib believes, from the injunction against denationalization as is formulated in article 15 of the Universal Declaration of Human Rights: 'No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.' The injunction is predicated on the risk of rendering a person stateless.[43] But Benhabib establishes a direct link between the

[40] Compare Lindahl (2004), p. 470: '[The] external borders that close off the EU also connect it to rest of the world. By laying down external borders, the EU includes itself and what it excludes in an encompassing unity of legal places: the legal world. The area is not a legal enclave in what is otherwise a geographical continuum – the 'earth', was we might call it; by referring to 'third-country nationals', whether legally or illegally resident in the EU, Directives 2003/9 and 2003/86 indicate that, no less than the area, the rest of the world has a normative status: it is the ensemble of territories where, unless authorized to enter the EU, these individuals ought to be. Accordingly, the EU posits the Area and third countries as places within a *common* legal world, *common by virtue of the claim that all individuals have their own place within the distribution of places*.' (italics are mine).

[41] For this reason, Van Roermund refutes the claim the cosmopolitan ideal of world citizenship is paradigmatic of the right of freedom of movement: '[T]he cosmopolitan academic is not the role model for freedom of movement. For the academic, 'shifting grounds' is certainly an enriching and nourishing experience. But these *ex*-plorations presuppose a 'homeland' from which one may set forth to other regions, and to which one can always return.' (Van Roermund 2009, p. 171). The right to freedom of movement should, therefore, paradoxically be interpreted as the right to stay, namely as 'the right to stay rooted in a nursing and nourishing environment that 'land' or (more broadly) 'country' stands for in a paradigmatic way.' (Ibid., p. 170).

[42] Cf., OT, p. 302.

[43] Cf., Van Waas 2009, p. 61.

prohibition of denationalization and the right to membership that is relevant for all immigrants, not just for those who are stateless: 'Liberal democracies … must themselves accept naturalization, i.e., admittance to membership, as the obverse side against denationalization. Just as you cannot render individuals stateless at will, nor can you, as a sovereign state, deny them membership in perpetuity. You may stipulate certain criteria of membership, but they can never be of such a kind that others would be permanently barred from becoming a member of your polity. Theocratic, authoritarian, fascist, and nationalist regimes do this, but liberal democracies ought not to.' [44] From a theoretical point of view, the right to membership is principled on communicative freedom which enables the individual to exercise personal autonomy. The right to seek and be granted membership is but the reverse side of the right – derived from the exercise of personal autonomy – 'to withdraw consent to exist within certain state boundaries.'[45]

Thus, Benhabib proceeds from the assumption that others do have a right to seek and be granted membership. This right challenges the traditional boundaries of the nation-state that define membership in terms of natural, historical or cultural belonging. In the absence of natural or cultural attachments to a country, how, if at all, can immigrants claim a right to membership? Indeed, the question that motivates the entire book is: If traditional boundaries are no longer apt to regulate the political and legal integration of newcomers, on what grounds, then, can membership be conferred?

The particular strength of *The Rights of Others* derives from the fact that it seeks to accommodate the right claims and interests of both parties involved. Over against the individual's freedom, Benhabib affirms the freedom of a democratic people which is guaranteed by the principle of sovereignty. The right to select and exclude non-nationals at the borders of a state is concomitant to the right of a sovereign people to determine itself. Perhaps the most important contribution of Benhabib's argument to the ongoing debate on immigration is that it acknowledges that states set the terms for access and membership, while at the same time places the burden of proof in case of rejection on the receiving state. Throughout her book, there is a clear presumption against restricting the individual's freedom by excluding him from membership, the corollary being that it is for states to explain and justify why a certain immigrant can never become a full member of the polis. From the outset of the book, it is clear that some practices of exclusion are always impermissible. So, states retain a certain discretion to impose requirements for membership, such as length of stay, resources, language skills or working abilities, as long as there is no discrimination on ascriptive grounds. 'The others', whose rights Benhabib seeks to spell out and secure, include all immigrants, without any differentiation between foreigners whom we like and who are like us, and immigrants who do not share in our dominant values, beliefs and practices.

Benhabib's claim that exclusion on ascriptive grounds cannot be justified concurs with the EU Long Term Residents Directive (2003/109/EC) which

[44] Benhabib 2004, p. 135. Dora Kostakopoulou takes the issue a step further, arguing that the issue of membership should be uncoupled from nationality matters altogether. Cf., Kostakopoulou, D. 'Thick, Thin and Thinner Patriotisms: Is This All There is?', *Oxford Journal of Legal Studies*, vol. 26 (2006), pp. 73-106. Cf., also Kostakopoulou, D. 'Why Naturalisation?', *Perspectives on European Politics and Society , Special Issue on 'Europeanisation': Regulation and Identity in the New Europe*, vol. 4 (2003), pp. 85-115.

[45] Benhabib 2004, p. 137.

regulates the legal position of third country nationals legally within the European Union, affording them a European resident status which is to equal the status of an EU national. Recital 5 of the Directive reads: 'Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation.' Remarkably, though, refugees and persons granted subsidiary protection are excluded from the ambit of this Directive, with the effect that their legal status, even after years of legal residence, remains highly uncertain.

My question to Benhabib is, therefore, very simple: Does her theory, that seeks to ground the political and legal integration of newcomers, provide a compelling argument to include refugees in the Long Term Residents Directive as is strongly advocated, amongst others, by the European Council on Refugees and Exiles?[46] Does her theory on inclusion, which tenaciously refuses to make membership contingent on history, ethnicity or culture, has the advantage of bringing the integration of refugees into view again, as is recommended by article 34 of the Refugee Convention? In short, does Benhabib offer a substantial reason to grant refugees asylum here, and afford them with the full catalogue of human rights so as to offset the current favoring of returning refugees home? As Benhabib, herself, notes, 'while the right to seek asylum is recognized as a human right, the *obligation to grant asylum* continues to be jealously guarded by states as a sovereign principle.'[47] Does her effort to source a right to membership give a solid theoretical basis for a right to asylum as enshrined in article 18 of the EU Charter of Fundamental Rights?[48]

3.4 'We, the People'

The right to have rights is the right of those who are vulnerable in every aspect of their lives, as they are without a political community willing and able to bestow and guarantee rights. It is a claim at the behest of those who have been expelled from their country, and who are trying to reestablish their terrestrial ties by seeking admission in a different community. But the right to have rights is not an easy solution to the refugee and stateless problem. For, it also reflects a fundamental dilemma that is related to a basic insight in modern democracy and popular sovereignty. Modern democracy and popular sovereignty express that the people is both the author of the laws and the interested party thereof. Or, as Arendt puts it, the insight that we are equal and free on account of mutually granting ourselves rights. Hence the dilemma: If rights presuppose political reciprocity between the members of a community, and are the outcome of our joint political action, what,

[46] Cf. Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Qualification Directive March 2010.
[47] Benhabib 2004, p. 69.
[48] 2000/C 364/01, article 18: 'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January, 1967, relating to the status of refugees and in accordance with the Treaty establishing the European Community.'

then, can be the ground for a *right* to have rights?[49] How can the refugee, who as a non-member is excluded from political action, claim a right to have rights? The difficulty has been clearly formulated by Michelman: 'According to Arendt's argument, you require inclusion because inclusion is a precondition of your contributing by action to the production of, and hence the possibility of your having (further) rights; but this inclusion, which is presently lacking to you (that's why you are claiming it) would by the same token be a precondition of your contributing to the production of, and, hence, your having, this very right to inclusion.'[50]

In her journey to refound a right to membership, Benhabib proceeds from this very dilemma. Democracy, she argues, requires closure. As it expresses that legislation is the self-legislation of a We, it requires, from its very beginning, a clear demarcation between those in whose name the laws have been enacted, and those upon whom the laws are not binding, as they did not partake in the process of self-legislation.[51] The people's freedom, guaranteed by the right to self-determination, is therefore necessarily bounded,[52] as it is brought about by the selection and exclusion of values that determine the common good at the same time that boundaries are drawn that separate members from non-members.[53] Importantly, boundaries are always drawn from within, that is, *we* decide upon the norms, rules and practices of inclusion and exclusion. Indeed, suppose that the other would partake in the process in which those norms and practices are ruled. Then his very participation would already amount to some form of inclusion, while his very inclusion or exclusion was precisely what had to be decided.[54] The lack of political reciprocity between those who are in and those who are out, therefore, implies an inevitable asymmetry between members and non-members. Benhabib's observation is, therefore, astute: 'A shared feature of all norms of membership … is that those who are affected by the consequences of these norms and, in the first place, by criteria of exclusion, *per definitionem*, cannot be party to their articulation.'[55]

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[49] Cf., also Schaap (2011), p. 27.

[50] Michelman, F. 'Parsing "A Right to Have Rights"', *Constellations. An International Journal of Critical and Democratic Theory*, vol. 3 (1996), p. 206.

[51] Cf. Benhabib 2004, p. 219.

[52] Cf., also Lindahl, H. 'Border Crossings by Immigrants: Legality, Illegality and Alegality', *Res Publica*, vol. 14 (2008), p. 121.

[53] Cf., Benhabib 2004, p. 45.

[54] This is the ultimate insight of the five friends in Kafka's short parable, 'Gemeinschaft.' In fact, it is their only realization that makes some sense. Told from the first person plural perspective, the five community members are at pains to reject a sixth man from their community. The five men understand each other to be friends, though they seem to be uncertain as to what constitutes their friendship. They share nothing in particular in common, except the fact that they are all adamant to keep the sixth man out. As the sixth man is quite persistent and vexing, they deliberate that, perhaps, they should explain to him why he cannot join them. But they cannot think of any substantial reason, as they themselves do not know why they form a group. But, apart from the fact that they are unable to communicate a valid reason to the sixth man, they bethink that to talk to him and include him in their deliberations would be tantamount to accepting him in their community. They are, it can be said, aware of the asymmetry between them and him. To be sure, this asymmetry does not in and of itself justify the exclusion of the sixth man or exclusion in general, as I intend to demonstrate throughout this book.

[55] Benhabib 2004, p.15. For an argument to the contrary see: Abizadeh, A. 'Democratic Theory and Border Coercion. No Right to Unilaterally Control your Own Borders', *Political Theory*, vol. 36 (2008), pp. 37-65. Based on the assumption that 'the demos of democratic theory is, in principle, unbounded', Abizadeh argues that practices of inclusion and exclusion 'must consequently be democratically justified to foreigners, as well as to citizens.'(Ibid., p. 38). According to Abizadeh, democratic theory in and of itself already establishes

This, however, does not imply that Benhabib privileges a sovereign right of inclusion and exclusion. As said already, Benhabib offers a thought-provoking intervention in the debate on immigration as she takes the interests and rights of both parties involved into account. She mediates between the sovereign right of a people to determine itself, and the right of others to seek and be granted membership, undercutting both the closing off of borders on the basis of a presumed predominance of sovereignty while, at the same time, showing 'open borders' to be theoretically infeasible, as well. She successfully argues against a rhetoric that privileges a sovereign people to be free to determine admission conditions on account of an alleged 'distinctiveness of groups and cultures'[56] that has to be protected against immigrants who dilute and impair that distinctiveness. Referring to cosmopolitan norms that regulate the relations between foreigners and states[57] and that have been incorporated in international law, she argues that it is simply false to assume 'that shared cultural commonalities will always trump human rights claims.'[58] Cosmopolitan norms, she argues, have created 'a network of obligations and imbrications around sovereignty.'[59]

But Benhabib is equally sceptical about those theories that too quickly play the card of human rights in their defence of open borders, on the assumption that democratic closure is unjust and discriminatory, per se.[60] As she recognizes the regulatory rights of democracies without denying others the right to seek membership, she has to come up with a theory of democratic self-understanding and self-definition that does not exclude the others beforehand for reasons of cultural integrity or identity. She draws upon a normative theory of deliberative democracy and discourse ethics in order to make intelligible why the rights of a people and the rights of immigrants are not mutually exclusive, but are open to mediation and mitigation.

Though not mutually exclusive, the rights of the two interested parties may, in fact, be conflicting. But conflict is not the problem. Rather it is, according to Benhabib, the way out of the problem. Indeed, the whole of Benhabib's argument revolves around the teasing out of the discordant, fractured and unstable nature of democratic collective identity which makes it liable to an on-going contestation. On her account, the crack in collective identity is nothing other than the duality – constitutive for liberal democracies[61] – between its concrete particularistic content

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political reciprocity between members and foreigners. If power, such as border control, is exerted over people, this exercise should be justified to them democratically for a foreign power to be legitimate. Abizadeh, therefore, argues for the establishment of democratic forums or cosmopolitan democratic institutions so as to ensure that practices of inclusion and exclusion are jointly controlled by citizens and foreigners (Cf., Ibid., p. 54). This, however, raises the question why, if at all, practices of inclusion and exclusion would continue to hold if 'the others' and 'we' already jointly control these practices.

[56] For the sake of transparency, it should be noted that Benhabib argues against Walzer's theory on democratic citizenship as he presents in *Spheres of Justice: A Defense of Pluralism and Equality* (1983). Cf., Benhabib 2004, pp. 117-120.

[57] Cf., Benhabib, S. 'Hospitality, Sovereignty, and Democratic Iterations', in Post, R. ed. *Another Cosmopolitanism. Seyla Benhabib (with commentaries by Jeremy Waldron, Bonnie Honig, Will Kymlicka),* Oxford/New York: Oxford University Press 2006, p. 148.

[58] Benhabib 2004, 126.

[59] Ibid., p. 67.

[60] Benhabib here argues against Joseph Caren's 'Aliens and Citizens: The Case for Open Borders'. Cf. Ibid., pp. 94, 95.

[61] Compare Ibid., p. 44: ' "We, the people", refers to a particular human community, circumscribed in space and time, sharing a particular culture, history, and legacy; yet, this people establishes itself as a democratic

and the universal principles of human rights to which it aspires. From the vantage point of the universal, those who are excluded can, and in fact will, contest the civic boundaries of a democratic state: 'The democratic people constitute themselves as sovereign because they uphold certain principles of human rights and because the terms of their association interpret as well as flesh out these rights. Of course, the precise interpretation of human rights and the content of citizens' rights must be spelled out and articulated in light of the concrete historical traditions and practices of a given society. Yet these principles are not exhausted, either in their validity or in their content, through their embodiment in specific cultural and legal traditions alone. They have a context-transcending validity claim, in the name of which the excluded and downtrodden, the marginalized and the despised, mobilize and claim political agency and membership.'[62]

Thus, Benhabib sources the others' right to membership in the fissure of collective identity which is limited to the duality between the universal and particular. As I set out to demonstrate, however, it is this derivation that obscures the stakes involved in the right to have rights by taking the political sting out of it.

According to Benhabib, the theory that best suits the ongoing tension between the universal and particular, and that makes this tension fruitful, is a normative theory of deliberative democracy that draws on the principles of a discourse ethics.[63] Following Habermas, Benhabib spells out that the primary concern of discourse ethics is the democratic warrant of norms and institutions. This concern motivates the basic premise of discourse theory: 'Only those norms and normative institutional arrangements are valid which can be agreed to by all concerned under special argumentation situations named discourses.'[64]

Yet this basic premise raises more questions than it answers. Benhabib frames these questions as specific manifestations of what she coins as the *paradox of democratic legitimacy*. This paradox manifests itself in several ways, only two of which will be discussed here, as they explicitly relate to the question of setting boundaries.[65]

We already implicitly touched upon a first manifestation of the paradox which relates to the question of scope.[66] Formulated against the backdrop of discourse ethics, the paradox is this: As discourse theory proceeds from the assumption that only those norms and practices are valid that can be agreed upon by all those concerned, it presupposes a political reciprocity between those who partake in discourse. But the question, the first question, so to speak, is, of course: Who are to be involved in the discourse? Who are to be party to this reciprocal relation? Suppose that those who participate in the process of norm setting and positioning of boundaries would raise the question, who is to be included and who excluded. Clearly, the question is self-begging: As discourse had already started, it takes for

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body by acting in the name of the universal. The tension between universal human rights claims, and particularistic cultural and national identities, is constitutive of democratic legitimacy.'

[62] Ibid., pp. 123, 124.

[63] Cf., Ibid., p. 12.

[64] Habermas as cited in Ibid., p. 13.

[65] The paradox of democratic legitimacy also appears in Benhabib's writings as the paradox between the will of all and the general will, relating to the question whether the general will can err. For a critical assessment of this paradox as Benhabib understands it, see: Honig, B. 'Between Decision and Deliberation: Political Paradox in Democratic Theory', *American Political Science Review*, vol. 101 (2007), pp. 1-17.

[66] Cf., Benhabib 2006, p. 167.

granted what it set out to decide, namely who is to have a seat at the table and who isn't. Indeed, the boundaries that qualify some as members while discarding others as such cannot be democratically drawn. In relation to the question of scope, political reciprocity founders. Van Roermund clearly captures the dilemma: 'Indeed, there is a problem at the very heart of reciprocity: prior to reciprocal acknowledgement, a decision has already been taken concerning who is to be involved in the set of individuals between whom reciprocity will reign. And, by necessity, this decision cannot be taken reciprocally, without seriously begging the question.'[67] The question, who is to participate and who isn't, always comes too late and can only be answered in retrospect. Democracy has always already begun and the very first question – or the very first decision – withdraws itself from democratic deliberation, thus forfeiting the reciprocity of reason giving.

What is at issue here is, of course, the question of the constitution or foundation of a people. Benhabib, however, does not view the first question, who belongs to the people, as a matter of decision, but rather, casts it as a mere fact of historical contingency. As the question who belongs to the people - to be asked and answered by the very same people - is bound to silt in vicious circles, Benhabib relegates the problem to history. This has the effect that, as Nasström observes, the 'constitution of the people is typically brought up as a question of identity – does it need to be thick or thin in order for democracy to work? – whereas its legitimacy remains unexplored.'[68] As the people itself cannot democratically decide who belongs and who doesn't, the people, Benhabib argues, has to be understood as an historical contingent fact.[69] History thus comes at the rescue of democracy. Stipulating that the people is the outcome of historical contingent forces enables Benhabib to free the people from an essentialist understanding of nationhood and national belonging that define a people in terms of a community of fate.[70] This has one clear advantage: For, even though democracies out of necessity require closure, this does not mean that they are closed. On the contrary, a fortuitous product of history, who belongs to the people and who doesn't, is a rather contingent fact which renders the civic boundaries of a democratic community contestable.

And indeed, the question who makes up the people not only darts out at the dawn of history, but also resurfaces whenever a person, arriving at the borders of a state, seeks admission and claims membership. The paradox that democracy cannot democratically decide on its own limits then reappears in full. For, suppose that We and the other were to take joint action to decide on his inclusion or exclusion; then his very participation in the process would already presuppose his or her inclusion which, however, was precisely the topic of the joint action. Hence, we have

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[67] Van Roermund, 2009, p.174

[68] Nasström, S. 'The Legitimacy of the People', *Political Theory. An International Journal of Political Philosophy* vol. 5 (2007), p. 625.

[69] Cf., Benhabib 2004, p. 175.

[70] Cf., Benhabib 2006, p.167. Vice versa, democracy comes at the rescue of history as democracy tries to live up to universal norms of human rights. According to Honig, Benhabib understands history as a continuous occurrence of events in a linear process of time. Honig summarizes (and criticizes) Benhabib's argument as a model of 'rights adjudication' which 'reassures us that the continued developments along the trajectory of rights will take us to a desirable democratic outcome … This is a tempting narration, and a familiar one, in which supposed systems of rights are (to borrow Habermas' term) 'tapped', as liberal democracies take the protections and privileges they first limited to propertied white males and then spread them outward to encompass all classes, races and genders.' (Honig 2006, p. 113). Cf., also Honig (2007), p. 11).

Benhabib's astute observation that 'we can never eliminate the paradox that those who are excluded will not be among those who decide upon the rules of exclusion and inclusion.'[71]

But felicitously, the discourse theory Benhabib elaborates has its own way of dealing with this. The boundaries between members and non-members can be rendered fluid, the asymmetry between inside and outside can be eased, and the dilemma of the deadlock of reciprocity can be mitigated by way of another manifestation of the paradox of democratic legitimacy. This time, the limit to democracy does not derive from the question of scope, but relates to the fact that the people's sovereignty is proclaimed in the name of humanity. That is, the right of a people to determine and rule itself so as to bring out and guarantee freedom is predicated on universal principles in the articulation of which the people itself did not participate. What originates democracy is, again, something fundamentally a-democratic, the paradox being that 'the democratic sovereign draws its legitimacy not merely from its act of constitution but, equally significant, from the conformity of this act to universal principles of human rights that are in some sense said to precede and antedate the will of the sovereign and in accordance with which the sovereign undertakes to bind itself.'[72]

On this account, the paradox of democratic legitimacy affirms the sovereignty of the people, while at the same time limits or directs it towards a universal moral standpoint.[73] Adherence to universal principles of human rights does not infringe upon the people's sovereignty nor does it render democratic practice futile. Rather, it is what sets democracy in motion and keeps it going; it sets a democratic people the task to flesh out the universal, to articulate, contextualize and make concrete the universal demands of human dignity and equality. In democracy, the universal matters, in the twofold sense that it is what is paramount and what materializes with democratic practice. Democracy, in short, embodies the universal. Echoing Habermas, Benhabib claims that the universal is dependent upon context while at the same time it can never be immanent or exhausted by any particular context. Though context- dependent, the universal is also what counts against any particular context, breaking every democratic closure asunder. The universal demands, so to speak, that it be reclaimed, resignified and repositioned time and again. Committed to the universal which it seeks to flesh out, democracy defines itself as a constant working-through of the paradox of democratic legitimacy. So even though something fundamentally a-democratic pertains to the origin of democracy, this does not, in Benhabib's view, put doubt on the legitimacy of a democratic people. For, in working through the paradox, a democratic people assure itself of its own legitimacy. That is, by assuming and re-appropriating the universal, the democratic people 'shows itself to be not only the *subject* but also the *author* of *its laws*.'[74]

To sum up the argument: From the second manifestation of the paradox of democratic legitimacy, a constitutive tension between the universal and particular unfolds that allows easing of the harshness of the inevitable asymmetry between members and non-members that arises from the first manifestation of the paradox.

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[71] Benhabib 2004, p. 177.
[72] Ibid., p 44.
[73] Cf., Honig (2007), p. 4.
[74] Benhabib 2004, pp. 19, 20.

The people's commitment to the universal reminds it, so to speak, of its own moral failures or shortcomings with respect to those who have been excluded without their consent. The whole point of discourse ethics is, therefore, to bring a democratic people to the awareness of 'the disjunction between the universalist content of its constitutional commitments and the paradoxes of democratic closure.'[75] And this is to make possible the critical altering of practices and exclusion.[76] Note that not just the rights of others are at stake here. What is equally at stake is the legitimacy of the people. Indeed, if Benhabib argues that fairly open or porous borders 'are most compatible with the philosophical self-understanding and constitutional commitments of liberal democracies',[77] it is because the legitimacy of the people would be seriously compromised if it tries to secure and close itself off against 'the others' for reasons of national sovereignty and cultural identity or integrity.[78] As said, it is by virtue of the tension between the universal and particular that democracies are set the task to flesh out the universal time and again. And as it turns out, immigrants prove to be of great help to that task, contributing to and sustaining (instead of challenging) the very democratic legitimacy of the people. On account of their different cultural habits, values, beliefs and practices, they question the way host communities presently express and embody the universal, posing 'a challenge to the democratic legislatures to rearticulate the meaning of democratic universalism.'[79]

3.5 'We, the Others'

So, what opens up a space for others to claim membership is, according to Benhabib, the crack in collective identity. 'Our fate, as late-modern individuals', Benhabib reasons, 'is to live caught in the permanent tug of war between the vision of the universal and the attachments of the particular.'[80] Apparently, immigrants ensure this does not result in a clash of arms. Because of the duality between the universal and particular, democratic collective identity is inherently contingent and hence open to challenge. Immigrants play on this contingency, posing nasty questions as to who we think we are to limit the universal in the way we do. And in doing so, immigrants act thoroughly democratically, contributing, that is, to 'ongoing processes of transformation and reflexive experimentation with collective identity.'[81]

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[75] Ibid., p. 20.
[76] Cf., Ibid., p. 21.
[77] Ibid., p. 12.
[78] Benhabib here implicitly addresses the broader question as to why states comply with international law. Alexander Betts explains this compliance on the basis of a combination of reciprocity and legitimacy. With respect to the international cooperation in relation to asylum he argues: 'Providing asylum imposes a cost on the individual contributing State. However, States generally value the existence of the overall regime because it provides public global goods of security and stability, on the one hand, and humanitarianism, on the other. Insofar as respecting asylum contributes to the overall regime, long-run reciprocity is likely to be in States' interests. Furthermore, providing asylum also confers legitimacy upon States insofar as compliance with the long-established norm of asylum is an important factor of what defines a 'civilized State.' (Betts, A. 'The Refugee Regime Complex', *Refugee Survey Quarterly*, vol. 29 (2010), p. 19).
[79] Benhabib 2004, p. 212.
[80] Ibid., p. 16.
[81] Ibid., p. 65.

But here things start to rumble. And they start to rumble because Benhabib makes collective identity the starting point for negotiating the civic boundaries of a democratic polity. Indeed, what allows for a mediation between the rights of others and the sovereign right of a people is the contingency of the people's identity. However, as I will argue, this causes a gradual but fatal slide from the question of immigration to the issue of integration. Though it would be artificial to draw a strong line between both issues, the point of the matter is that the question of integration arises in relation to immigrants who already availed themselves of a legal place within the host community, be it as members or as legal residents, whereas the issue of immigration revolves around precisely that: getting access to a community to which one does not belong. Making collective identity the starting point has the opposite effect that integration ultimately sets the terms for immigration.

True, as should be amply clear by now, Benhabib is certainly aware of the fundamental asymmetry between immigrants and the receiving state as the latter sets the norms for inclusion and exclusion. Yet as I intend to demonstrate, she entirely downplays this asymmetry, either by focusing on the rights of immigrants already legally within a polity, or by establishing a moral reciprocity between the immigrant and the receiving state, which will be discussed in the next section. Equally true is that Benhabib strongly rejects immigration policies that only admit foreigners who 'are like us.' [82] The others Benhabib has in mind are no doubt those immigrants who come from non-Western countries with different cultures, traditions and religions, and which are, for sure, not as prosperous as the affluent West where they hope to make a better living. But insofar as Benhabib sources a right to membership in the contingency of collective identity, her conceptual argument sells out precisely those immigrants.

To explain, we must take a closer look at the way in which *The Rights of Others* frames the challenge inherent in the arrival and presence of others. When the stranger arrives upon the shores of the other, Benhabib says, there is always a moment of anxiety.[83] The question is: Why? As it appears to me the challenge others pose to the receiving community doesn't much differ from what foreigners 'like us' do: Both reinvigorate democratic collective identity. Because of the necessity of democratic closure and the regrettable exclusion it entails, democracy cannot but fall short of the universal principles it claims to adhere to. Immigrants – for whatever other reason – seek admission precisely because we claim to uphold universal principles of human rights. And, by showing their belief in us, we can believe in ourselves again. The other's challenge to democracy safely sits on democracy's own principles; instead of challenging the host community, the other, rather, *realizes* the democratic project. If there is a challenge, it is only because of our own falling short of our own principles. Shortcomings, to be sure, that can be restored if only we think again how best to realize the universal.

Indeed, from a universalist standpoint, every democratic closure, every concrete context, is found to be morally wanting. Benhabib, therefore, holds that 'potentially all practices of democratic closure are open to challenge.'[84] Yet such a challenge is

[82] Ibid., p.116.
[83] Cf., Benhabib 2006, p. 156.
[84] Benhabib 2004, p. 17.

too general for what she has in mind, as it lacks the concreteness she is after in arguing for a critical alteration of inclusion and exclusion. So, in the same move as when it said that all practices of inclusion and exclusion are open to challenge, it is claimed 'that there are some practices of democratic closure which are more justifiable than others.'[85] Benhabib, therefore, has to come up with a criterion that explains why some practices of inclusion and exclusion are more justifiable than others. In her theoretical framework, what provides this criterion is the legitimacy of the people,[86] with the effect that the challenge of the other is limited to a contestation of collective identity. Let's take a closer look at this challenge and tease out what it presupposes and what Benhabib does not say.

On Benhabib's account, the other contests the historical particularistic concretization of the universal, exposing the contingency thereof. So if the other confronts us, and is perhaps even experienced as somewhat threatening, it is because he questions the way we believe the universal announces itself. On account of his different values, beliefs and practices, the other reminds us that the universal might just as well be articulated and represented in a different way. For example, we believe that a woman's dignity is guaranteed by her freedom to dress as she pleases, not being obliged to veil herself. But the Muslim woman tells us that it is precisely her scarf that expresses and guarantees her dignity as a woman. This is exactly what Karima Dezba, a school teacher in France whom Benhabib cites, is telling us: 'Because my wearing the scarf […] is so fundamental to who I am […] you should respect it as long as it does not infringe on your rights and liberties.'[87]

The Muslim woman wearing the scarf exposes us to the contingency of our own values. She opens up a perspective unto a different way of signifying and representing what we both believe to be universal and absolute, i.e., our dignity as a woman. Reclaiming the universal through democratic practice, Benhabib holds, will be successful if one day Delacroix' Marianne will be represented by a woman veiled by her scarf.[88]

So if the other incites us to engage in reflexive processes of identity transformation, which democracy is all about,[89] it is because she opens up a perspective onto *another We*, claiming a different future for our living together as a people. But for such a challenge to occur at least two conditions must be met. First of all, the other who calls us into question must already be within the borders of our polity. That is, for challenge to occur, the other is already legally among us and has already established long lasting and meaningful ties with the 'host' community. Put differently: She already has a place of her own which she can leave so as to enter upon the public realm where she can raise her voice and agree or disagree with whatever dominant opinions resound there. This is exactly what the three young Muslim girls did in France when they refused to take off their scarves at school, forcing, Benhabib says, 'what the French State wanted to view as a private

[85] Ibid., p. 17.
[86] For an insightful and critical assessment of the legitimacy of the people as it figures in Benhabib´s thinking see: Nasström (2007), pp. 624-658.
[87] Karima Debza, as cited in Benhabib 2004, p. 194.
[88] Cf., Ibid., p. 195.
[89] Cf., Ibid., pp. 82, 83.

symbol – an individual item of clothing – into the shared public sphere, thus challenging the boundaries between the public and the private.'[90]

Secondly, for the exposure of our contingency to take place, the other surely does not act as an isolated individual. On the contrary, she has to understand and represent herself as belonging to a We. Indeed, were there only to be three girls who refused to unveil themselves in their classrooms we would probably not be bothered by their act. As Bonnie Honig comments on this example offered by Benhabib: 'The girls appeared in the public realm as the effects of a social movement, no less than Rosa Parks did when she supposedly spontaneously one day out of the blue simply refused to move to the back of the bus.'[91]

Benhabib discusses these real-life examples to illustrate what we are dealing with when thinking about the other's right to membership. But the examples don't do the job they are supposed to do, as the individuals that figure in them already have long- lasting attachments with the community (they participate in the educational system) and even are already full members. They might be marginalized, bad enough in itself, and belong to a minority group, but still: They are members in the legal sense of the word. The three Muslim girls who were expelled from school because of their scarves do not illuminate the problem of a *right* to have rights, but instead show us, by default, what a 'truly cosmopolitan citizenship' would entail, namely 'the reclaiming and the repositioning of the universal – within the framework of the local, the regional, or other sites of democratic activism and engagement.'[92]

To push the point a bit further: *The Rights of Others* is not about a *right* to have rights or a *right* to membership, and how democratic communities can respond to this. It is about the content and meaning of new forms of democratic citizenship in 'multinational and multicultural societies.' Outsiders, Benhabib says, are not at the border but within.[93] This is true, no doubt. But it is surely not the correct way to pose the problem of immigration. For if outsiders are already within, it is no longer about finding a ground for membership against the backdrop of large scale movements of people across state borders, but about the integration of newcomers who do not share in the dominant cultural tradition of the host state.

In this respect, it is particularly disturbing that Benhabib passes over the problem of first-gate admission in silence. The question from which Benhabib proceeds is: '*Once first admission occurs*, what is the obligation of a liberal state to those it has admitted?'[94] This question, however, entirely downplays what is at stake with the right to have rights, as it presupposes that 'the others' are already granted permission to stay upon the territory of the host state. To then press for full membership rights appears to me to be rather chimerical.

First of all, to press for full membership rights on the basis of the injunction against denationalization does not solve the quandary. Recall that Benhabib takes the injunction to reflect the assumption that no one should be a permanent stranger upon the land and that, therefore, the path to membership ought not to be blocked. To be sure, there are plenty of good reasons to argue against a permanent

[90] Ibid., p. 187.
[91] Honig 2006, p. 116.
[92] Benhabib 2004, pp. 23, 24.
[93] Cf., Ibid., p. 210.
[94] Ibid., p. 137 (Italics are mine).

exclusion of the full catalogue of political, civil, social, economic and cultural rights (reasons, to be sure, which are always limited to immigrants *legally* within the country). But the question is: Does it derive from the inferred injunction? Clearly, it does. For the injunction is *relative,* that is, predicated on the risk of rendering an individual stateless. Most immigrants retain the nationality of their home countries, implying that a possible denial of membership would not result in statelessness. The point has already been made by Aleinikoff: '[It] is not clear to me that the prohibition against denationalization gets us very far towards a right to naturalization. The harm of denationalization is that it usually leaves a former citizen stateless; but a failure to naturalize rarely has such an effect. The vast majority of immigrants residing in a host state retain the citizenship of their home states. Perhaps there is some duty to provide some kind of membership to stateless migrants, but this would do little for most resident immigrants.'[95]

Second of all, if current conditions governing admission and access to membership are taken into account, it appears that the door to membership is already open for the majority of immigrants. Though one manifestation of sovereignty is certainly the right to determine the rules for the conferral of membership in its own national interest, states have already significantly relaxed the requirements for naturalization.[96] As Van Waas is keen to remind us, however, this very relaxation has come in tandem with increasingly restrictive measures of immigration control. That is, prospective immigrants are selected at the borders of a state precisely because they are viewed as potential new citizens. As Van Waas argues, states 'can now hold what is, in effect, a selection process for prospective immigrants by predetermining the conditions that must be met for eligibility to enter a country. This can be seen as a sort of initial qualification round for access to citizenship.' [97] For example, potential immigrants who wish to come to the Netherlands have to pass a language test in their country of origin in order to prove Dutch language skills. Additionally, they have to prove acquaintance with what is deemed to be essential cultural and historical knowledge about the future host country. As Dijstelbloem, et.al, conclude in their extensive research on the technologies of migration policy, integration policy is increasingly used as a tool for immigration control.[98] Groenendijk also disputes the view that pre-departure integration measures merely serve the aim of improving integration chances of

[95] Alexander Aleinikoff, T. 'Comments on the Rights of Others', *European Journal of Political Theory*, vol. 6 (2007), p. 426. As to the question of immigration in general, there is yet another question to be asked. Benhabib claims to substantiate her theory with empirical evidence of different disciplines. But, does empirical evidence suggest a univocal link between immigration and permanent settlement, as Benhabib, pressing for full membership, assumes? For a considerable part of immigrants, immigration is a temporary option to work, provide for their families, and to build some capital which they intend to invest in their projects back home (Cf., Düvell, F. & Jordan, B. *Irregular Migration: The Dilemmas of Transnational Mobility*, Cheltenham; Edward Elgar 2002). Perhaps, then , it is more fruitful, as Aleinikoff suggests, 'to focus on the rights that immigrants ought to possess in a liberal state without tying those rights to eventual naturalization … [In] point of fact, most liberal states have quite generous naturalization rules. The issue of the 'rights of others' is not their inability to naturalize; rather it is that while they are resident immigrants, the liberties they enjoy are not seen as matters of right, but rather as gratuities towards them bestowed by their hosts.' (Aleinikoff, (2007), pp. 428, 429).

[96] Cf., Van Waas 2009, p. 165.

[97] Ibid., p. 165.

[98] Cf., Dijstelbloem, H & Meijer, A. (eds). *Migration and the New Technological Borders of Europe*, Houndmills (etc.): Macmillan Publishers Limited 2011.

prospective immigrants. The goal of such pre-departure tests is, rather, to select 'desirable immigrants' and restrict access to other ones.[99] With respect to German and Dutch language tests in the country of origin before departure, Groenendijk observes: 'So far, the policies appear to correlate with a considerable but temporary drop in the number of family-reunification visas in the Netherlands and Germany. Headlines in Dutch newspapers generally defined the measure as successful because they had the latter aims (selection and reduction) in mind. Both in 2008 and in 2009, the Dutch Parliament was concerned about the "pass level" of the test because the percentage of successful candidates was considered too high.'[100]

The upshot of integration setting the terms for immigration is that those whom we are willing to admit as 'others' are set up in advance. I am not suggesting that Benhabib somehow secretly favors the preservation of cultural homogeneous communities. But as she frames the question of a right to seek and be granted membership against the backdrop of cosmopolitan citizenship in multicultural societies, the very question from which she proceeds dissolves into the question of integration. As she also skips the question of first-entry rules, her argument dispatches into integration, setting the terms for immigration. The upshot thereof is that a polity's responsiveness to others is limited to the known, expected, invited and desirable others.

There seems one way out for Benhabib: her appeal to a moral universalism. But as I intend to show below, this does not clear the air of chimera to me. In fact, it makes it even worse.

3.6 A Moral Right to Membership?

Benhabib, no doubt, would object. And she could substantiate her disagreement with reference to the moral universalism that bears out the motto of her book 'No human is illegal.' This moral universalism is to explain why we not only open our borders for immigrants whom we already selected as prospective citizens and who are like us, but also for those immigrants we did not expect and who are not like us. On account of this moral universalism, we never simply act as citizens in our own interest, Benhabib argues, but are perceptive to the rights and interests of others, as well.

Indeed, the recourse to a moral universalism nuances the common view of democracy in a decisive way. Recall that democracy, as Benhabib rightly argues, requires closure. Though premised on universal principles, 'We, the people' can never be everyone. Indeed, democracy signals that legislation is the self-legislation of a We that is both the author of the laws and the interested party thereof. But this is not the whole story: The fact that democracy is principled on the universal highlights that those who have an interest in the laws do not simply coincide with those who enact the laws.[101] Precisely insofar as the people's sovereignty is derived

[99] Cf., Groenendijk, K. 'Pre-departure Integration Strategies in the European Union: Integration or Immigration Policy?', *European Journal of Migration and Law*, vol. 13 (2011), p. 27.
[100] Ibid., p. 27.
[101] In his studies on democracy, representation, boundaries and immigration, Lindahl, too, fines the view that only the demos has an interest in its laws, without, however, taking recourse to a moral universalism, as Benhabib does. Lindahl's argument is particularly relevant and compelling in relation to irregular economic

from, and directed towards, universal principles of human rights, we can never merely act as citizens in our own interest; we should also always take into account the interests of others who do not belong to our polity: 'Since discourse theory articulates a universalist moral standpoint, it cannot limit the scope of the *moral conversation* only to those who reside within nationally recognized boundaries; it must view the moral conversation as potentially extending to all of *humanity* … Due to the open-endedness of discourses of moral justification there will be an inevitable and necessary tension between moral obligations and duties resulting from our membership in bounded communities and the moral perspective we must adopt as human beings *simpliciter*.'[102]

Let's imagine, then, a conversation between the members of a polity who realize they are humans as well, and who are outraged by the sufferings of refugees in today's world. On some lucky day, they increasingly gain awareness of their own moral foundation which falls short with respect to refugees who, as Benhabib says, are kept in a world- wide state of exception.[103] Spurred by their moral indignation, they decide to recognize the right of each individual to have rights. Those who participate in this moral discourse and dream the others in it, are very well aware that even in post-national constellations, membership in a bounded community will remain crucial for the enjoyment of rights. Decided as they are to use their best endeavors to end the plight of refugees, they propose something like a passport of world citizenship, taking, in fact, a suggestion by Benhabib seriously. 'The individual', she writes, 'who is stateless, in our times as much as in Arendt's,

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immigration. Closely scrutinizing inclusion and exclusion that are constitutive for political order, Lindahl basically contests that those who have an interest in the polity are limited to the members of the polity. His argument relies on a trenchant analysis of the constitution of the European Union as an internal market that qualifies the European project 'as the constant improvement of living and working conditions.' In this very process, the EU closes itself off as an inside over against an outside, drawing the boundaries that separate the EU from the rest of the world. But, as argued at the beginning of this Chapter, precisely by separating itself from the rest of the world, both regions are at the same time united in an encompassing whole: 'The European polity closes itself off as a polity by including itself and what excludes it in an encompassing spatial unity. See, here, a specific instance of the double functions of borders which cannot separate the EU from the rest of the world without also uniting these two regions into a whole.' (Lindahl, H.K. '*Jus includendi et excludendi*: Europe and the Borders of freedom, Security and Justice', *King's College Law Journal*, vol. 16 (2005), p. 242) The EU, thus, takes up its place in the world, implying that the EU's internal market is consistent with a world market. For this very reason, third country nationals outside the EU do, in fact, have an interest in the EU's internal market, as they can expect the EU to balance its interest with the interests of others who partake in this world market. Lindahl, here, translates an intuition most of us would recognize, perhaps even with a feeling of indignation, into a thoroughly philosophical argument. Those who have seen the unsettling documentary, *We Feed the World,* are aware of the consequences of the EU's agricultural policies; if the EU subsidizes its own farmers, allowing them to export their tomatoes at low or dumping prices to sub-Saharan countries, native tillers are seriously hindered to earn a living, as they cannot sell their tomatoes at such low prices. As a direct result of EU policy, native tillers are likely to be pushed back below the level of subsistence. It shouldn't surprise us, then, that they will try to make their way to Europe to work in our greenhouses. Their immigration can be qualified as reproaching Europe for disregarding the interests of other players at the world market. As Lindahl understands the challenge irregular immigrants pose to the Member States of the European Union: 'Indeed, precisely because the EU takes up a place in the world by closing itself off as an internal market in which freedom, security and justice are to reign, challenges to the Union's external borders not only call into question what the Union claims to be its own place – the internal market – but also the Union's claim that favoring the internal market is consistent with a *common* world.'(Lindahl 2004, p. 471). In a later article, Lindahl effectively plays this argument against Benhabib. Cf., Lindahl, H.K. 'In Between: Immigration, Distributive Justice, and Political Dialogue', *Contemporary Political Theory*, vol. 8 (2009), pp. 415-434.

[102] Benhabib 2004, pp. 14-15.

[103] Cf., Ibid., p. 163.

becomes a nonperson, a body that can be moved around by armies and police, customs officers and refugee agencies. Wouldn't perhaps a truly cosmopolitan politics require that every human child receive a passport as a world citizen in addition to his/her local identification papers?'[104]

Let's assume that the notion of a world citizen makes sense, absent a world state, and let's not bother about who is to issue such a passport (which is, of course, the first question). Would this solve the quandary? Certainly it would not. For the possession of a passport as a world citizen does not answer the question as to *which* state holds legal responsibility for the individual, or which state is responsible for assessing an asylum claim, and where asylum has to be granted. To be in possession of a world passport endows the individual, at best, with an imperfect moral right which is of no avail because, as Michelman argues, 'there is no ascertainable agent, among all citizenries and countries of the world, who specifically bears the duty (of admission somewhere) correlative to claim (against exclusion everywhere) of any particular refugee.'[105]

The proposal of a world citizen passport which every human child should acquire at birth raises another, related question. It seems to suggest that the asymmetry between inside and outside, which Benhabib is at pains to demonstrate, isn't really a problem as long as we engage in a continuous process of growing self-awareness that makes us conceive of the other as a human being just like we are human beings. Yet the following should be kept in mind: Even if we opt for fairly open borders and give effect to our proclaimed commitment to refugee rights, and even if this is most compatible with our political and philosophical self-understanding, it is still *we* who *decide* to grant refugees leave to entry and to remain.

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[104] Benhabib 2006, pp. 175, 176. Importantly, the rationale behind the question of what a truly cosmopolitan politics would require, comes by way of another question: 'Doesn't the category of 'crimes against humanity' suggest that the human person ought to be given universal legal personhood?' (Benhabib 2006, p. 176). But the very notion of 'crimes against humanity' already suggests that 'humanity' is a limited concept. The concept of 'crimes against humanity' can, therefore, not be staged as refuting the paradox of human rights Arendt developed and Agamben elaborated on. In his critique of Agamben that implicitly targets Arendt, Volker Heins plays the card of crimes against humanity to prove Agamben (and Arendt) wrong. Heins' main argument is that the enjoyment of human rights is not limited to nationals belonging to a nation-state. To substantiate his claim, Heins refers to the US Aliens Tort Claims Act (1789), that gives non-nationals the right to seek redress in US courts for human rights violations that occurred outside the US. Heins gives the example of a plaintiff from Paraguay residing in the US, who sued an official from his former home country for torturing his brother. Apparently, the court ruled in favor of the plaintiff arguing that 'the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.' (as cited in: Heins, V. 'Giorgio Agamben and the Current State of Affairs in Humanitarian Law and Human Rights Policy', *German Law Journal*, vol. 6 (2005), p. 850). But, instead of refuting Agamben's claim (and, by implication, Arendt's, whom Heins also mentions) this seems to prove Agamben's point exactly. Both Agamben's and Arendt's arguments do not limit themselves to the coincidence between human rights and citizens' rights as played out by the nation-state, but aim to expose that humanity itself is a limited concept.

[105] Michelman, (1996), p. 203. Arendt's mistrust of human rights, and her skepticism with respect to world citizenship, is pertinacious, in this respect. Compare Arendt, H. *Men in Dark Times*, London: Jonathan Cape 1970, pp.81, 82: 'A citizen is by definition a citizen among citizens of a country among countries. His rights and duties must be defined and limited, not only by those of his fellow citizens, but also by the boundaries of a territory. Philosophy may conceive of the earth as the homeland of mankind and of one unwritten law, eternal and valid for all. Politics deals with men, nationals of many countries and heirs to many pasts; its laws are the positively established fences which hedge in, protect, and limit the space in which freedom is not a concept but a living reality. The establishment of one sovereign world state, far from being the prerequisite of world citizenship, would be the end of all citizenship. It would not be the climax of world politics, but quite literally its end.'

And even if this would significantly benefit refugees, it does not solve the conceptual problem of the asymmetry between us and them, nor would it mitigate the peril that one day we might decide to close our borders again. Lindahl, as always, astutely sketches the dilemma Benhabib or any other theorist faces who invokes moral universalism transcending political reciprocity. If the asymmetry between inside and outside continues to hold, and it is *we* who *decide* for fairly open borders, then 'the others' would have a *privilege*, and not a right, to immigrate. '[A] privilege to immigrate', Lindahl argues, 'either presupposes political reciprocity between members, such that those inside *grant* outsiders leave to enter, or it draws its normative character from moral reciprocity between individuals. In the first case, reference to a 'privilege' does not get us beyond the *status quo*, as the asymmetry between the positions inside and outside continues to hold … In the second case, it reintroduces the dilemma … namely, that, although cosmopolitan right is held to trump positive law, there is no sovereign that may enforce the 'privilege to immigrate.' [106]

The intricacy returns, in all vehemence, in the moral framing of a right to have rights and the subsequent moral dialogue Benhabib constructs between me and the other. In the expression, 'a right to have rights', the first use of the term 'right' obviously differs from the rights that are contingent on this first right. Benhabib explains the difference by dividing both usages over two different planes: a moral one and an empirical or juridico-civil one. Rights in the latter sense presuppose, as said before, political reciprocity as they 'generate reciprocal obligations among consociates, that is, among those who are already recognized as members of a legal community.'[107] The *right* to have rights, by contrast, does not stem from political reciprocal relationships, but 'is addressed to humanity as such' and 'evokes *a moral imperative*.'[108] Benhabib goes on to explain that 'in the first mention, the identity of the other(s) to whom the claim to be recognized as a rights-bearing person is addressed remains open and indeterminate … The asymmetry between the first and second uses of the term 'right' derives from the absence in the first case of a specific juridico-civil community of consociates who stand in a relation of reciprocal duty to one another.'[109]

The lack of a political reciprocity between 'the others' and receiving states is, thus, counterbalanced by a moral reciprocity that does exist, Benhabib holds, between the members of a polity and its others. This moral reciprocity grounds the first- gate admission rights for refugees for which Benhabib presses, while she concedes states the power over first- gate admission rules for immigrants. But to morally ground a right to seek asylum does not solve the conceptual problem as enshrined by the right to have rights. Indeed, Benhabib entirely downplays what is at issue in the right to have rights, either by skipping the problem of first- gate admission or by setting the problem aside by saying that it is a moral right. Benhabib takes the context of immigration as the proper framework to discuss the most crucial issues of the predicament democratic states and refugees face in facing each other, which backfires on refugees.

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[106] Lindahl (2009b), p. 420.
[107] Benhabib 2004, p. 57.
[108] Ibid., p. 56.
[109] Ibid., pp. 57-58.

Consider in this respect the moral dialogue between me and the other. The dialogue as Benhabib imagines, runs as follows: 'If you and I enter into a moral dialogue with one another, and I am a member of a state of which you are seeking membership, and you are not, then I must be able to show you with good grounds, with grounds that would be acceptable to each of us equally, why you can never join our association and become one of us. These must be grounds that you would accept if you were in my situation and I were in yours. Our reasons must be reciprocally acceptable; they must apply to us equally.'[110] Recall that, according to Benhabib, communicative freedom should be at the core of membership regulations. The dialogue as sketched above, therefore, has to respect the immigrant's communicative freedom, that is, his ability to agree *or disagree* with us on the basis of reasons. What sharpens the debate on immigration is, of course, the latter possibility: the immigrant's disagreement with our decision not to grant him leave to entry and/or to remain.[111] But Benhabib, though committed to the view that no human is illegal, nowhere discusses this possibility. As Aleinikoff rightly observes, if access to membership is reliant upon a dialogue of mutual reason-giving, it is hard to think of any reason the undocumented immigrant can bring into play to convince the members of the polity that he has a right to be within their polity. The same is true for refugees. For despite the initial differentiation between refugees and other immigrants with respect to first- gate admission, Benhabib does not uphold the difference when it comes to the issue of permanent residence. First admission, she argues, does not automatically lead to membership.[112] Hence, her concluding remarks at the end of the book: 'I have pleaded for first-admittance rights for refugees and asylum seekers but have accepted the right of democracies to regulate the transition from first admission to full membership.'[113] So, states are relatively free to set the conditions with which both immigrants and refugees have to comply in order to qualify for full membership, as long as these requirements – length of legal stay, resources, language skills, working abilities – do not violate the communicative freedom of the others concerned. Surely, these requirements, whatever their specific content, won't pose many problems for regular immigrants. Already selected as potential new citizens, they have taken the opportunity to participate in the economy and society of the receiving state and build some capital. As the European Council on Refugees and Exiles notes, however, refugees are often unable to comply with such material conditions, as they face obstacles in trying to exercise their right to work. Due to their limited access to the labor

[110] Ibid., p. 138.

[111] Hence, Lindahl's well-aimed criticism of Benhabib's construction of the moral dialogue between me and the other: '[T]he whole point of the dialogue is *political*: you request to join '*our* association', not *an* association, in general. When providing you reasons to this effect, I act as a member of the community, not as a human being. Accordingly, our dialogue is asymmetrical: when giving you reasons, I claim, implicitly or explicitly, that I and the other members of the community are entitled to determine *among ourselves* whether or not we will allow you to join our association, and on the basis of reasons that we regard as relevant from the point of view of *our* joint interest.' (Lindahl (2009b), p. 422. In a similar vein, Spijkerboer also argues that it would be wholly reductive to view asylum seekers as naked human beings: 'If [refugees] lay down an asylum claim, they address a particular community. The response to that claim does not stem from something universal, but from the community being addressed.'(Spijkerboer, T. 'De tweesprong. Het mythisch debat over het Europees asielrecht', in Spijkerboer, T. & Van Walsum, S., *Grensoverschrijdingen. Opstellen over Vreemdeling en* recht, Utrecht: Nederlands Centrum Buitenlanders 1997 p. 83).

[112] Cf., Benhabib 2004, p. 177.

[113] Ibid., p. 221.

market, in combination with the physical and psychological effects of their flight, refugees do not have equal opportunities with other immigrants to achieve certain material conditions.[114] And, what if refugees do not meet the requirements of linguistic skills and working abilities as we have already decided to only grant them temporary protection with a view to return home, which necessitates their seclusion from society and the normal order of things? In that case, we would have respected first admission rights, as Benhabib wishes, but leave it to ourselves to decide whether or not refugees are allowed permanent settlement. What if we decide to respect the refugee's communicative freedom by sending him back home, as we believe that one's natural and original surroundings nourish the exercise of personal autonomy? What if we decide to grant only a humanitarian leave to remain, offering the refugee some training in certain capacities that are of use back home so that upon return he can support himself and his family? If membership really is an issue of global justice, as Benhabib claims it is, we might just as well decide to make the world a better place to live, cut in the costs of asylum procedures and transport the available amount of money to development aid, so that people can stay where they are.[115] Moreover, it might just as well be argued that we do not even have to grant refugees the right of first entry if we decide, in the context of our neighborhood policy, to export the asylum procedure overseas.

And if we enter into a moral dialogue with the refugee, explaining to him that he can never be a full member of our polity and justify his return 'home' with all the above and other reasons, what reason can he possible give to convince us that he does have a right to stay? How moral and reciprocal can this dialogue be? How moral and reciprocal can it be, if at all, even if the outcome of the dialogue comes at the advantage of the refugee, as we have decided he is allowed to stay? Sofia Näsström's criticism of Benhabib seems well-aimed to me: '[I]f migration is sourced in decisions and actions taken by the people, how reciprocal could this process of reason-giving be? […] It becomes clear that rather than resolving the problem of migration, the 'reciprocity of reason- giving' perpetuates the status of migrants by means of democratic law. It takes the existence of a people as a given, and thereby makes progress and change dependent upon a human right which, as Arendt foresaw, is no right except for those who already *have* rights, that is, for those who are situated within the boundaries of a people.'[116]

Below, I will once more return to the right to have rights. I will argue that it is the right of those who can no longer say 'We', and who, therefore, lack the power to challenge the collective identity of a democratic people. The right to have rights does not pose a challenge to a receiving community by opening up a perspective onto another We, as Benhabib believes it does; instead it calls into question the *right* a democratic people claims to have to select and exclude non-nationals. Put differently, it calls into question the legitimacy of the people. Only if we proceed from this challenge can we gradually work towards an understanding of asylum as

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[114] Cf., ECRE, *Comments on the Proposal for a Council Directive amending the Long Term Residents Directive (2003/109/EC) to extend its scope to beneficiaries of international protection* March 2008.

[115] Bauböck makes a similar argument against Benhabib with regard to economic immigration. Cf., Bauböck, R. 'The Rights of Others and Boundaries of Democracy', *European Journal of Migration and Law*, vol. 6 (2007), p. 400.

[116] Nasström (2007) p. 649.

protection here, so as to bring into view again the integration of refugees in host societies, which *The Rights of Others* failed to do.

3.7 Border (In)Security

The preceding pages argued that recourse to moral universalism is of little avail to those who arrive at our borders unexpected, uninvited and undocumented -- which, of course, most refugees are. A moral reciprocity between 'the others' and the members of a receiving polity, as Benhabib fleshes out, fails to respond to the right to have rights, as it is claimed by those who are intercepted and diverted, rejected and returned, and who do not, of course, agree with our reasons to refuse them. This no doubt constitutes the most difficult and pressing case when it comes to the issue of immigration. Indeed, the right to have rights manifests itself at the borders of a state and relates to the problem of first- gate admission. The right to have rights, therefore, first translates as the right to seek asylum and have access to an asylum procedure. I will return to this in the final chapter.

As shown in Chapter One, the current immigration policy of the EU interferes with the refugee protection regime and actually contravenes the right to seek asylum.[117] A range of measures taken to control immigration before departure and/or arrival has made it increasingly difficult for refugees to reach the territory of one of the EU Member States and to lodge an asylum claim. Benhabib is not unaware of this. In fact, she even makes the strong claim that refugees 'exist at the limits of all rights regimes and reveal the blind spot in the system of refugees, where the rule of law flows into its opposite: the state of exception and the ever-present danger of violence.'[118]

But Benhabib cannot explain this situation except by explaining it away as a failure of our own universal and moral commitments. The misfortunes refugees have to suffer are unhappy exceptions to an otherwise happy rule of sovereign self-determination that is cloaked by principles of human rights. These misfortunes do not inform us about the rule except insofar as the rule provides the correctives to end these dire adversities. On Benhabib's account, liberal democracies are self-limiting collectives that have excluded the use of force and violence as they 'at one and the same time, constitute the *demos* as sovereign, while proclaiming that the sovereignty of this *demos* derives its legitimacy from its adherence to fundamental human rights principles.'[119] In her view, sovereignty belongs to the law, since it belongs to the people and is, therefore, limited by universal principles that give the people its legitimacy. Benhabib has convincingly argued that democracy requires closure, and in doing so, she has drawn attention to the on-going relevance of the concept of sovereignty. Though she does not put it in these terms, herself, it is fair

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[117] Compare Betts (2010), p. 26: 'The creation of new cooperative mechanisms within the travel regime has enabled Northern States to reduce asylum seekers' access to spontaneous arrival asylum in the North while not overtly violating the principle of *non-refoulement* set out in the 1951 Convention. Given that the main legal and normative obligations of the refugee regime only kick in once an individual reaches the territory (or jurisdiction) of the asylum State, controlling access to territory has allowed many Northern States – most notably European States – to avoid incurring obligations and bypass the refugee regime.'

[118] Benhabib 2004, p. 163.

[119] Ibid., p. 198.

to say that sovereign power reigns over the boundaries that separate inside from outside.

But this is only part of the story. For sovereign power does not only reign over boundaries from within, but also from without. The catchword here is insecurity. A brief look at the official website of Frontex – the EU border security agency that co-ordinates border management among member states – reveals what is at stake here. According to its mission statement, the aim of Frontex is to strengthen the freedom and security of EU citizens.[120] The main focus of Frontex is, therefore, on what threatens our freedom and security and to avert that threat.

Indeed, over the past few years, asylum and immigration came to be perceived as a security issue.[121] This does not express any suspicion that asylum seekers and undocumented immigrants have some general disposition towards criminal conduct. The Dutch memoranda on Illegal persons (*Illegalennota*) from 2004, makes perfectly clear that no essential link exists between asylum, unauthorized stay or entry, and criminality. To the contrary, persons illegally staying upon the territory are not likely to commit criminal acts, not even minor ones, in order to survive, as it is in their interest not to draw the attention of the authorities.[122] The Dutch memoranda on return (*Terugkeernota*), also from 2004, illuminates why asylum and immigration constitute a security threat. It argues that as 'a matter of course, the institution and governance of a democratic legal order cannot be reconciled with the presence of large numbers of people illegally staying upon Dutch territory.'[123] The Memoranda intimates that the *de facto* presence of persons upon the territory damages democratic legal order[124] because, as Lindahl explains, the people 'reject attributing to themselves the immigrant's stay as an act that they have jointly authorized as an act in which they have a joint interest.'[125]

Clearly, our legal and political institutions do not operate well if surrounded by disorder. For democracy to be effective, a unified medium over against disorder is required in which the normal laws can be applied. Claiming to *strengthen* the freedom and security of EU citizens is, therefore, another way of saying that Frontex guarantees and maintains the normal running of things. Frontex is an agency that anticipates threats. As can be read on its website, the first task of Frontex, given its aim of strengthening freedom and security, is to carry out risk

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[120] See Frontex's mission statement available at the official Frontex website http://www.frontex.europa.eu (last accessed on April 1, 2011).

[121] Cf. Huysmans (2000), pp. 751-777.

[122] Cf., Tweede Kamer der Staten-Generaal, *Illegalennota* /29537, (2003-2004), p. 4.

[123] Directoraat-generaal Internationale aangelegenheden en vreemdelingenzaken, *Terugkeer Nota. Maatregelen voor een effectieve uitvoering van het terugkeerbeleid*/29344, no. 1, 21 november 2003, p. 8.

[124] Lindahl has sought to understand what security is, for it to be threatened by immigration and asylum. Lindahl reveals that the rationale for qualifying asylum, immigration, terrorism and transnational crime all as security issues lies with the fact that all these phenomena pose a challenge to state borders. Arguing that the concept of (in)security is reliant upon the concept of (dis)order, Lindahl argues that immigration constitutes a security threat as it involves the unauthorized border crossings by immigrants: '[T]he 'securitization' of immigration … is a specific response to the perception of border crossings by aliens as a disruption or disturbance of political order. Whereas insecurity is intimately connected to the experience of disorder, security is linked to acts of ordering, of instituting order in response to what disrupts it. To the extent that they disrupt political order by disturbing the distinction between inside and outside, border crossings by immigrants attest *ex negative* to the general function of order: to 'limit the unlimited, to determine the relatively indeterminate'(Cassirer).' (Lindahl (2008) p. 120.)

[125] Ibid., p. 127.

analysis, assess threats, look at vulnerabilities, weigh the consequences[126] and coordinate actions to turn the threat. Frontex claims to merely complement the border management of EU Member States, and to promote the cooperation among border- related law enforcement bodies responsible for internal security.[127]

But the threat Frontex is to discern and avert is a threat precisely because it damages the normal running of things. Put more strongly: Asylum and immigration are perceived to threaten the continued existence of the European polity. This corresponds with the way immigration and asylum are usually depicted: Immigration is a flow that overwhelms us, threatening us to be washed away, and it is said, we are swamped by refugees.[128] And this, no doubt, allows for all means necessary to turn that threat. Indeed, isn't it telling that Frontex, in its concern for our freedom and security, does not even mention justice, which is the third fundamental value of Europe's Area of Freedom, Security and Justice? In its aim to secure our freedom, it might just as well have added: at any cost.

Any account of Frontex, or of border management in general, must take into account that a border security agency ultimately operates as a police force[129] and, therefore, never merely enforces the law but acts in the space that is opened up beyond mere law enforcement.[130] Border security agencies operate in a double movement; in the same blow as they claim to act in the interest of the EU and its citizens, they exempt themselves from the values, norms and regulations that are valid inside the polity they seek to protect. Fischer-Lescano, et al., argue that Frontex operates in a legal void, as not all its actions are legally covered or open to judicial review: 'European jurisdiction is at present unable to react to potentially unlawful practice of the European border control regime because the situation suffers from a lack of efficient access to legal protection.'[131] Frontex does not enforce the law, but rather, exerts an unchecked force over the naked bodies of the immigrants and asylees who venture their way to Europe.[132]

This double movement of affirming and securing the normal order, while at the same time suspending it, features a state of exception in which, as Agamben says, acts that do not have the value of law acquire its force.[133] Taking his cue from Carl Schmitt, Agamben argues that the state of exception reveals the paradox of sovereignty according to which sovereign power is both inside and outside the law

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[126] For example, in the summer of 2009, Frontex reconsidered and re-analyzed push and pull factors for illegal immigration against the backdrop of changes worldwide caused by the economic crises, published in its report *The Impact of the Global Economic Crisis on Illegal Migration to the European Union* (August 2009).

[127] Cf. Frontex's mission statement available at: http://www.frontex.europa.eu

[128] Dummett draws attention to the vocabulary, and the implications thereof, used to describe refugee and immigration movements. Cf., Dummett, M. *On Immigration and Refugees* London: Routledge 2001.

[129] Some authors even assert that Frontex operates in a quasi- or even para-military fashion. Cf., Spijkerboer, T. 'The Human Costs of Border Control.' *European Journal of Migration and Law,* vol. 9, (2007b), p.127: '[B]oth Member States and the EU itself have increasingly adopted a technical, quasi-military approach to border control.' Cf., also Fischer-Lescano, A., Löhr, T., Tohidipur, T. 'Border Controls at Sea: Requirements Under International Human Rights and Refugee Law', International *Journal of Refugee Law,* vol. 21 (2009), 257.

[130] In *Zur Kritik der Gewalt,* Benjamin demonstrated that the police does not exercise power but instead exerts a naked force in which acts of law enforcement cannot be distinguished from acts of law- making. The indistinction between enforcement and constitution constitutes the ignominity of this authority as its acts lose all claims to validity. Cf., Benjamin, *Selected Writings, Volume 1: 1913-192,* Cambridge/London: The Belknap Press of Harvard University Press (1996) p. 243.

[131] Fischer-Lescano et al., (2009), p. 295.

[132] Cf., Ibid., pp. 275, 276.

[133] Cf., Agamben 2005, p. 38.

at the same time: 'the sovereign, having the legal power to suspend the validity of the law, legally places himself outside the law.'[134] The paradox expresses that in order to secure and preserve an inside, sovereign power moves outside.

Importantly, the paradox of sovereignty is not only manifested in turbulent times when states explicitly declare a state of emergency with a view to secure law and order, -- as did Italy, for example, in the summer of 2008, in relation to illegal immigration. The paradox also holds, and is even brought to its most extreme point, when states resort to ambiguous, or even outright unlawful means, that are no longer referred to as emergency measures but instead gain a semblance of normalcy, - as happened one year later in Italy, when the Berlusconi government consolidated the harsh anti-immigration emergency measures in legislation that came to be known as the 'security package.'[135] Hence, Agamben argues that '[t]he principle according to which sovereignty belongs to law, which today seems inseparable from our conception of democracy and the legal State, does not at all eliminate the paradox of sovereignty; indeed it even brings it to the most extreme point of its development.'[136]

That the paradox of sovereignty is brought to its most extreme point has certainly something to do with democracy's inability to face its own violence. Frontex saves lives. The fact that it is the EU border security agency that coordinates action to keep unwanted foreigners at a distance is glossed over by such lofty phrases as 'search and rescue operations.'[137] In the same way, the violence of threatening with force and exerting control over persons in distress at sea is pushed to the background and subordinated to the humanitarian aim of saving lives.

Today, it appears that our freedom and security is strengthened at any cost. And, the human cost of border control is high. United Against Racism, a NGO based in Amsterdam, published a list of 13,250 documented immigrant deaths at the borders of Europe.[138] The list takes as its staring point 1995, the year in which restrictions on immigration were put into practice, and documents the deaths until 2009. As these concerns only documented deaths, the actual number is expected to be much higher. The list includes both deaths of immigrants directly caused by acts of border guard officials (such as shooting and minefields)[139] as well as the deaths

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[134] Agamben 1998, p.15.

[135] For an overview of Italy's declaration of a state of emergency in relation to illegal immigration and the subsequent adoption of anti-immigrant legislation see: Human Rights Watch, *Italy: Reject Anti-Migration Bill. Effort to Criminalize Undocumented Migrants Comes as Hostility to Immigrant Rises*, June 22, 2009. Available at: http://www.hrw.org/en/news/2009/06/21/italy-reject-anti-migrant-bill

[136] Agamben 1998, p. 30.

[137] Fischer-Lescano, et al. come to the persuasive conclusion that 'states cannot circumvent refugee law and human rights requirements by declaring border control measures – that is, the interception, turning back, redirecting, etc., of refugee boats – to be rescue measures.' (Fischer-Lescano, et al., (2009), p. 291).

[138] Cf., 'List of 13,250 Documented Refugee Deaths Through Fortress Europe', published by United Against Racism, available at www.unitedagainstracism.org.

[139] Though these deaths are certainly the exception, it should be noted that the state of exception opens up the space for violence to occur with impunity. In its report 'Violence and Immigration' (2005) *Médecins Sans Frontières* observes that the rise of (illegal) immigration 'goes hand in hand with an increase in the degree of violence used in the measures to control it.' (Médecins Sans Frontières, 'Violence and Immigration. Report on Illegal sub-Saharan Immigrants (ISSs) in Morocco' (2005) available at www.meltingpot.org, p. 4). For documentation of the use of violence by border guards see: Human Rights Watch, *Stuck in a Revolving Door. Iraqis and Other Asylum Seekers and Migrants at the Greece-Turkey Entrance to the European Union*, November 26,

of those immigrants who accidentally die on their way to Europe (suffocation as stowaways, drowning, suicide, starvation, dehydration, and so forth). Though with respect to the latter there is no *direct* causal link between immigrant deaths and the border control regime, there seems to be an *indirect* link, as these fatalities are clearly related to the tightening of border control, forcing immigrants to take dangerous immigration routes and resort to life-risking means. According to Spijkerboer, this indirect link at least triggers a positive obligation of states, first, to critically analyze and evaluate the risks and consequences of the current border protection regime and, second, to take the necessary efforts to minimize the risks of immigration.[140] With judicial acumen, Spijkerboer argues that '[t]he obligation of a State to take appropriate steps to safeguard lives is not conditioned on a causal relationship between the State's actions and someone's death. Rather, the obligation is triggered by the State's knowledge that a particular life is at risk and that same State's ability to do something about it. Increases in the number of fatalities of irregular migrants are related to the tightening of border controls. Thus, these fatalities are a foreseeable consequence of this policy. Although this does not lead to State responsibility, it does trigger a State's positive obligation to take preventive measures to safeguard the lives of those who are put at risk. In the context of border control measures, because States' policies increase the loss of lives of irregular migrants, they are obliged to exercise their border controls in such a way that the loss of lives is minimized.'[141]

This is not to deny the sovereign right of states to control their borders. But to establish this positive obligation is to bring to awareness that that border control is not only a matter of right, but of politics, as well. And, what is ultimately at stake is whether or not we can still regard the means deployed as our own. Today we have to face the fact that in the concern for securing the normal running of things, we appear to be willing to set that normal running of things aside. This leaves one to wonder whether we ourselves are not contributing to our own decline,[142] as long as we resort to, and rely upon, a naked, unchecked force that is exempted from human rights monitoring and legal scrutiny and that, at times, even resorts to an excessive use of violence.

In this respect Honig's question that motivates her entire *Emergency Politics. Paradox, Law and Democracy,* proves to be of utmost importance. She takes seriously the concern of a people for its own existence. But she moves the meaning and purpose of this concern just a little and takes it into the direction where it comes down to the question of *how* to survive an emergency situation. As the question

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2008; Pro-Asyl, *The Truth is Bitter But it Must be Told. The Situation of Refugees in the Aegean and the practice of Greek Coast Guard*, (October 2007), available at: www.proasyl.de

[140] Cf., Spijkerboer, T.'Over de Grens. Staatsaansprakelijkheid en de doden aan de grenzen van Europa', *Ars Aequi*, (2009a) pp. 623-632.

[141] Spijkerboer (2007b), p. 138.

[142] I am referring, of course, to the title of the ninth chapter of the *Origins of Totalitarianism*, in which Arendt reflects on the refugee problem, 'The Decline of the Nation-State and the End of Human rights.' As the title implies, lack of concern for the one is bound to drag along the other in its decline. See OT, page 290: 'For the nation-state cannot exist once its principle of equality before the law has broken down … Laws that are not equal for all revert to rights and privileges, something contradictory to the very nature of the nation-state. The clearer the proof of their inability to treat stateless people as legal persons and the greater extension of arbitrary rule by police decree, the more difficult it is for states to resist the temptation to deprive all citizens of legal status and rule them with an omnipotent police.'

implies, it would be reductive to deny the seriousness of a given situation, which leaves us no choice but to act. But the question as to how to survive hints at something else than the question relating to the means necessary to deflect, for example, immigrants and refugees so as to prevent their reaching our territory. The question, how to survive, revolves around the question as to how we ourselves, as a democratic people, relate to the means we adopt in order to overcome a crisis. To be more precise, it concerns the question whether we can still recognize the means deployed *as our own*. Honig's question plays on something like a political care for the collective self that takes care of a people's political and democratic integrity.[143] This political care for the self projects us into the future of the aftermath of the crisis where we are still around to clean up the mess we made. And, if we project ourselves into the future and are concerned not just for our mere existence, but for our integrity, as well, we might decide today to abstain from arbitrariness, injustices and violence because, as Judith Butler says, of 'the memory and anticipation of too much sorrow and grief, and this – in the name of the living.'[144]

Against Agamben, Honig suggests that we do not have to swallow the decision on the exception that suspends the validity of the normal laws. The political care for the self refuses 'the sense of stuckness that emergency produces'[145] and that makes us feel powerless. An emergency may be declared, but this does not foreclose the possibility of political action. And this political action might very well locate itself at the limits of the state, where it stands up, for example, for refugees' rights 'simply because they are there.'[146] The very phrase 'simply because they are there' remains much closer to the predicament that democracies and refugees face in facing each other. Indeed, if we stand up for refugees' rights simply because they are there, we do not simply act on the assumption that 'we are all human.' Indeed, the political action Honig has in mind draws on proximity rather than reciprocity. Therefore, in the remainder of this chapter, I will probe proximity as an alternative to Benhabib's attempt to morally ground the right to have rights. Before I embark on a conceptual evaluation of this alternative account, I will first illuminate what proximity amounts to in actual practice.

3.8.1 How to Shut Down a Camp

Here is a story of proximity. It is a story with a happy ending in the otherwise 'sad global epic of the denial of refugee rights.'[147] It is recounted by Michael Ratner,

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[143] Compare Honig, B. *Emergency Politics. Paradox, Law, Democracy*, Princeton/Oxford: Princeton University Press 2009, pp. 8, 9: 'What do we need to do to ensure our continuity as selves and/or our survival as a democracy with integrity? Our survival depends very much on how we handle ourselves in the aftermath of a wrong … When faced with such situations, we must act and we must inhabit the aftermath of the situation in ways that promote our survival as a democracy … Politically, surviving the emergency situation with integrity as a democracy might mean engaging in a kind of political care for the self.'

[144] Butler, J. 'Critique, Coercion and Sacred Life in Benjamin's 'Critique of Violence", in eds. De Varies, H & Sullivan, L.E eds., *Political Theologies. Public Religions in a Post-Secular World,* New York: Fordham University Press 2006, p.219.

[145] Honig 2009, p. 10

[146] Ibid., p. 130.

[147] Ratner, M. 'How We Closed the Guantanamo HIV Camp: The Intersection of Politics and Litigation', *Harvard Human Rights Journal*, vol. 11 (1998) p. 187. Bonnie Honig has her own anecdote that unpacks the intersection between law and politics. It concerns the actions and decisions of Louis Ferdinand Post, to

one of the lawyers who put the case of Haitian refugees detained at the U.S. naval station in Guantanamo Bay on trial. The story of the Haitian refugees is worth being told, Ratner believes, as it shows that in highly political cases, an exclusive focus on law is rather powerless, as is the appeal to moral humanitarian arguments. Legal advocacy was, of course, important in fighting the Guantanamo camp where refugees were detained for the sole reason of being HIV positive. In itself, however, legal argument meant very little. It was the political action that counted.

In June, 1993, after a decision of the District Court and under the persistent pressure of public opinion, the Clinton Administration finally freed the refugees who were held at Guantanamo for more than a year, and granted them access to the United States --something the Court did not explicitly demand. The Court's decision denounced state practice to bar Haitians from access to a proper asylum procedure by raising the standard of a well-founded fear for those supposedly infected with HIV. As the Haitians could not be forced back to Haiti, nor were granted access to US territory, they faced indefinite detention in the camp. Though the release of the refugees was a judicial victory, it would be too bold a claim to say that the law had won. For one thing, Clinton could easily have appealed the Court's decision which was likely to be reversed by the Supreme Court which is known, Ratner points out, to be hostile towards aliens in general, and Haitians in particular.[148] Moreover, state practice of setting up processing camps outside US territory where all constitutional and procedural rights are eliminated, was not directly challenged. After the HIV-camp incident, Guantanamo continued to function as an offshore processing center, and subsequent legislation was adopted that significantly extended the power of the executive branch to (mis)treat refugees as it pleases.[149]

But to say that the law had won would also be to miss the political energy and agitation that flocked around the litigation, and that gathered thousands of people together to resist the racism and discrimination displayed by the detention of HIV-positive Haitian refugees. In fact, it was the vigorous political action that strengthened the lawyers to push their case further. Initially, they went to trial to claim due process rights for their clients prior to a decision of the INS to send them back to Haiti. They didn't see any legal opportunity to challenge the exclusion of their clients on the basis of being HIV- positive (at that time third- country nationals infected with HIV were barred access from the United States) or to challenge the legality of the camp. They feared that such a direct challenge of state practice would be detrimental to their clients, as they would never be granted, they believed, access to the United States, and thus were likely to be forcibly returned to Haiti where they faced death. Claiming due process rights had the short term advantage of preventing their clients to be returned home, and at least would allow

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whom Honig dedicates a whole chapter in her *Emergency Politics*. Post was an assistant secretary at the Department of Labor during what came to be known as the First Red Scare – a series of bomb attacks by anarchist and communist groups. The state's solution to the terrorist treat of 1919, was the large scale deportation of aliens allied to or associated with the Communist party. When, in 1920, Post was charged with the responsibility for the deportations, he resorted to all of law's resources to stop them. My own reading of the HIV-Guantanamo trial is highly inspired by Honig's keen-witted interpretation of Post's actions to dwindle the number of deportations (Cf. Honig 2009, pp. 65-86).

[148] Cf., Ratner (1998) p. 218.

[149] Cf., Ibid., p. 220.

lawyers to visit the camp (something which until then was only (im)possible with the permission of military authorities). However, supported by a massive grass-roots campaign in defense of the rights of this specific group of refugees, the lawyers decided to go to trial again and challenge 'the legality of what had become an HIV detention camp where refugees were detained indefinitely.'[150] And they succeeded. The District Court ruled that the humanitarian camp, as it was referred to by both the Bush and Clinton administrations, constituted 'nothing more than an HIV prison camp' where 'refugees remain in detention solely because they are Haitian and have tested HIV-positive.'[151]

The struggle to free the refugees and bring them to the United States is a story about what it means to act politically in times of emergency; what it means, that is, to democratically resist exceptional measures that leave refugees in a legal void. Significantly, the coalition that came into being was called *Emergency Coalition to Shut Down Guantanamo*. It was an emergency coalition because of the crisis conditions under which the political action took place. But the emergence, it seems to me, can also be taken to point to something else, namely the emergence, or the rising forth, or the coming to the stage of a different democratic subject. The Emergency Coalition shows that, as Bonnie Honig argues in her *Emergency Politics. Paradox, Law, Democracy*, the people as the subject of democracy is also always a multitude. As also always a multitude, the people have to be constituted and re-constituted, shaped and reshaped as a unity, again and again. This allows us to understand, Honig says, 'democracy as a form of politics that is always in emergence.'[152]

As Ratner explains, the Bush and Clinton Administrations based their policy on 'what they believed was politically popular – and black HIV-positive Haitian refugees were certainly not thought to be popular.'[153] The callousness and harsh cynicism of government practice was demonstrated by INS official Duke Austin, who said to the *New York Times* that 'nothing was wrong with the camp because the Haitians were "going to die anyway".'[154] And indeed, Michael Cordozo, who worked for Clinton at the Department of Justice, told the lawyers 'that in his view … Clinton could weather a dead Haitian on Guantanamo better than he could deal with the negative political fallout of having HIV-positive Haitians coming to the United States.'[155]

But the people, who only a few months earlier elected Clinton as their new president, proved government to be wrong. The marginal position of the refugees surprisingly came to their advantage. Their weakness and supposed unpopularity turned out to evoke great solidarity in different kinds of communities that, for one reason or another, felt connected to the refugees: AIDS-activists, the Haitian community, African Americans, refugee and human rights organizations, religious leaders, Hollywood and public figures concerned about AIDS, students, anti-imperialists and Haitian democracy advocates.[156] The people stood up, said 'No', and came into action.

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[150] Ibid., p. 202.
[151] As cited in Ibid., p.203.
[152] Honig 2009, p. 14.
[153] Ratner (1998), p. 218.
[154] Ibid., p. 216.
[155] Ibid., p. 210.
[156] Cf., Ibid., p. 211.

So, the lawyers who represented the Guantanamo detainees did not exclusively focus on law. Of equal importance was the outside strategy they developed and deployed so as to assure that the case of the Haitian refugees became a matter of great public concern. The outside strategy included getting media attention, demonstrations, petitions and even engaging in civil disobedience.[157] The lawyers were no longer afraid that the organized political action, and at times even aggressive political strategies, would backfire on them and harm their cause: 'The politicians had already factored in the negative; we did not have to do it for them … Thoughtful activism is necessary to win legal battles and can achieve multiple and unforeseen objectives in struggles that are essentially political. Silence, on the other hand, achieves nothing.'[158]

Nor, as is clear, did the lawyers act alone. The final victory was the result of concerted action between different groups with different, and sometimes opposing, views and tactics, who managed, however, to find a common ground. The Haitian community, plagued for years by the stigmatization of Haitians beings carriers of HIV, wanted to steer away from the AIDS issue, and addressed the racism against refugees from Haiti. AIDS-activists, on the other hand, wanted to stress that Guantanamo was in fact an HIV prison camp. In the end, however, during a large demonstration, members from the Haitian community led the chant 'HIV is not a crime' and AIDS activists carried the slogan 'No Aristide, No Freedom.'[159] The Roman Catholic Church declared a day of fasting in solidarity with the refugees, which was picked up by students all over the country who participated in a week-long hunger strike. New York City stated that it would be willing to take all the Haitians in and provide for them housing and medical assistance.

Finally, those who participated in the political action on behalf of the refugees did not simply act in the name of humanity. They did not ground their actions in a moral universalism, claiming freedom, dignity and equality for all. In a way, they also violated a moral universalism as they acted on the basis of what Honig calls 'proximity[160]

3.8.2 Proximity

'How we Closed the Guantanamo HIV Camp' perfectly illustrates what Honig argues in *Emergency Politics*, to wit, that the rule of law is always dependent upon the rule of man. It shows that, as she says, 'the poor migrants and refugees' are not 'so dependent on law to position them with more clarity in its network.'[161] To understand the final victory as a mere result of legal advocacy is to downplay the political action of those involved back then, and to disempower political strategies of resistance still needed today. Indeed, the intersection between the legal process and the grass-roots campaigns might well be said to have reworked the paradox of politics as Honig understands it. According to Honig, this paradox is the chicken-and-egg problem of politics which renders the question what comes first – the

[157] Cf., Ibid., p. 210.
[158] Ibid., p. 219.
[159] Cf., Ibid., p. 213.
[160] Honig 2009, p. 123.
[161] Ibid., p. 131.

people or the laws – undecided. At the moment of founding, the people do not yet exist as a unitary force that forms and makes the laws that are to unite, exactly, the people. So, those who take the initiative to found community, act *as if* the people already exist as a unity, and claim a future world on the basis of which they act. But we, of course, do not have to agree with the unity and identity ascribed to us. We are, Honig says, also always a multitude, the 'unruly ungovernable double' of the people.[162] That is why the paradox not only pertains to the 'first' moment of founding. Instead, the paradox of the projection in the future of a people that is to ground this very founding, continues to haunt democracy: 'In some sense that is, the "people" are always undecidably present and absent from the scene of democracy. That is why it is always part of the point of democratic political practice to call them into being.'[163]

According to Honig, Arendt's notion of a right to have rights serves as a good motto for the constant need to rework the paradox of politics, and to bring the people into existence again and again.[164] In fact, those who participated in the *Emergency Coalition to Shut Down Guantanamo,* might well be said to have reworked the paradox 'as it is experienced by minorities, the stateless, the powerless, and the hapless.'[165] For, with the *Emergency Coalition,* another We emerged that claimed, as Honig would say, 'a future … on behalf of peoples and rights that are not yet and may never be.'[166] Those who participated in the *Emergency Coalition,* acted as if the refugees were already entitled to procedural and constitutional rights, claiming that they merely defended and represented these rights that existed *ex ante*. Government, of course, did not agree. It even requested an unprecedented $10 million sanction against the lawyers for making a frivolous case.[167] The lawyers did not give in, and continued to act on behalf of the refugees and their fundamental rights, reworking, again, the paradox, as these rights were both the condition and the objective of their actions.[168] And by doing so, they took the law, as Honig would say, into new directions, showing that Another We is possible.

However, I do believe that Honig, in her understanding of the right to have rights as a polemic call against existing communities that presupposes Another We that it seeks to bring into being, misses out on something, as does Ratner in his recounting of the HIV-camp case. As for him, of all the political actions that took place on behalf of the refugees, their own action was the most important one. The hunger strike to which the refugees resorted was the turning point that 'set the course for an outside agitation strategy.'[169] The most important lesson for him is, therefore, that the 'clients are the actors who drive the strategy. They have their own reality, their own demands, their own vision. We know more about the law, and we may have a particular range of skills and abilities … Our clients know more about their own lives and bring their own power to the case.'[170]

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[162] Cf., Ibid., p. 3.
[163] Ibid., p. 19.
[164] Cf. Ibid., p. 130.
[165] Ibid., p. 117.
[166] Ibid., p. 130.
[167] Cf., Ratner (1998), p. 218.
[168] Cf., Honig 2009, p. 129.
[169] Ratner (1998), p. 209.
[170] Ibid., p. 219.

There is, of course, some truth in stressing that refugees are not just victims who passively endure their fate. But to say that they bring their *power* to the case is to misunderstand the inhumane disempowerment refugees have to suffer inside camps. Their disempowerment speaks to the fact that all that remained for them was their naked body, their bare existence as the site of 'political action.' I do, of course, disapprove of and reject the statement of INS official, Duke Austin. But sadly, he captured the point quite well: Those detained in the camps are going to die anyway, their lives are not worth living and they are reduced to their muted bodily existence. They are deprived not just of their legal and political status, but of everything that makes them human.

Indeed, recall from the beginning of this chapter that the right to have rights signals that the life of the refugee is deprived of public appearance as well as his complete rightlessness. The conceptual problem at issue is how to claim a *right* to have rights while excluded from the rights that give *us* the equal claim to political activity. Of course, we can act *on behalf of* those who have lost a community willing and able to grant their rights, claiming another future, another We. Of course, we can, and should 'intervene in ways that claim Europe for a different present and future, for different constituencies, for a different politics.'[171] But the right to have rights brings us before the possibility of another We only if we take it upon ourselves to stand up for refugee rights. A contestatory politics that acts out another We that it both presupposes and pursues, in a sense, comes far too soon for the refugee. The refugee does not claim a different future for another Europe. Instead, he claims protection against the threat to his life and freedom. Agonistic politics that bring about a new and different We does not illuminate the challenge inherent in a claim to asylum.

There is a difference, therefore, between political action that draws on plurality, and the claim to a right to have rights at the behest of those who have lost their place in this world. There is, that is, a difference between the foreigner and the refugee. For – contra Benhabib – the distress of the refugee is precisely that he is not yet in a position to quarrel with us about our values that we believe represent the universal. Refugees are not a well-defined minority that can say 'We, the others' demand from you respect for our values, beliefs and practices that 'We, the others' believe embody the universal. What motivates the refugee's question is, rather, a matter of life and death. But why would a polity care? For – contra Honig – the refugee may be nearby in a geographical sense, and yet not register in a political sense. The dilemma at issue here is marvelously depicted by Bertolt Brecht's play *Flüchtlingsgespräche* (1940). The two man who escaped *Der Wieheißterdochgleich* sadly have to conclude that no country is willing to take them in and offer them a place of their own. They know they are alive. But that's all they can say.[172] Sure, sometimes they benefited from acts of neighbour love – and neighbour love inspires Honig's theory of proximity. But as one of the refugees considers: 'Warum es ist unheimlich, in einem Land sein, wo Sie davon abhängen, ob einer soviel Nächstenliebe aufbringt, daβ er Ihretwegen seine eigenen Interessen aufs Spiel

[171] Honig 2009, p. 125.
[172] This alludes, of course, to the motto of *Flüchtlingsgespräche* 'He knew he was still alive. More he could not say.'

setzt. Sie sind sicherer in einem Land, wos keine Nächstenliebe brauch, damit Sie kuriert werden.'[173]

Honig's evaluation of proximity evades the problems of a moral universalism. But it cannot sidestep the question of why the refugee's proximity would register as a challenge to the identity of a democratic polity.

Despite the decisive differences between Honig's approach that locates proximity in the paradox of politics, and Benhabib's approach that locates reciprocity in the paradox of democratic legitimacy, both usher in a similar conclusion. For both approaches locate the challenge of the right to have rights in the tension between the actual We and a possible We. Both mold the challenge as a challenge that exposes the contingency of the We, by opening up a perspective onto the possibility of another We.

But the refugee, I submit, discloses a more radical sense of contingency. Having lost a community of equals, the refugee is the one who can no longer say 'We.' Jean Améry's insight into the refugee experience, therefore, deserves careful consideration. For as he, himself a refugee from national-socialism, painfully makes clear in *Jenseits von Schuld und Sühne: Bewältigungsversuche eines Überwältigten* (1966), the refugee is a person (and not even that) who can no longer say 'we': 'Ich war ein Mensch, der nicht mehr 'wir' sagen konnte und darum nur noch gewohnheitsmaßig, aber nicht im Gefühl vollen Selbstbesitzes 'ich' sagte. Manchmal geschah es, daß ich im Gespräch mit meinen mehr oder weniger wohlwollenden Antwerpener Gastfreunden beiläufig einwarf: Bei uns daheim ist das anders. 'Bij ons', das klang für meine Gesprächspartner als das Natürlichste von der Welt. Ich aber errötete, den ich wußte, daß es eine Anmaßung war. Ich war kein Ich mehr und lebte nicht in einem Wir.'[174]

The challenge inherent in a claim to asylum derives from this. For the arrival of the refugee who has lost everything reminds us of the possibility, not of another We, but of the *absence of a We*. The refugee does not intimate a possible We, but rather, the *impossibility* of a We. The right to have rights does not, that is, play on the tensions between the actual We and a possible We, but rather, draws on the tensions between being and not-being, between the presence of a We and the absence of a We. As will be argued in the next chapter, this possibility of impossibility is also always our own possibility.

3.9 A Focus on Facticity – in Conclusion

The refugee's inability to say 'We' is the other side of his displacement which signals that he is nowhere in this world. The right to have rights, therefore, only makes sense within the context of displacement, and reflects the refugee's powerlessness to understand and represent himself as belonging to a We.
This is also, I believe, how Michelman understands the right to have rights. For a right to have rights to make sense and actually count against a particular community, Michelman suggests that the two usages of the term 'right' be divided

[173] Brecht, B. *Flüchtlingsgespräche*, Frankfurt am Main: Suhrkamp Verlag, 2000 p. 91.
[174] Améry, J. *Jenseits von Schuld und Sühne. Bewältigungsversuche eines Überwältigten,* München: Deutscher Taschenbuch Verlag 1970, p. 58.

over two different planes. Not unlike Benhabib, he argues that the rights to which membership entitles are the outcome of our joint political action. The *right* to have rights, by contrast, is not based on political reciprocity, and hence is not, Michelman says, politically grounded.[175] But the right to have rights does not, for that matter, establish a moral reciprocity between the one who claims it and the receiving polity. To morally ground such a right in the supposed existence of an abstract naked human being, and to say, as Benhabib does, that we respond to it as human beings *simpliciter,* is not only to fight against Arendt's loud cautions against human rights, Michelman says. It would also miss what Arendt was trying to point out, namely the 'irreparable groundlessness of rights' which affirms 'our own precarious, existential, collective self-care.'[176]

The preceding pages already tacitly opened up a perspective on the groundlessness of rights and, in particular, on the groundlessness of membership rights. Recall from the discussion of Benhabib's elaboration of discourse theory that the question of membership, who's in and who's out, is itself withdrawn from discourse. Democracy, it was argued, cannot democratically decide on its own (civic) limits. But according to Benhabib, history repairs this fundamental a-democratic aspect at the origin of democracy. Who belongs to the people and who doesn't is a matter of *facticity* in the sense of historical contingency. The corollary thereof is that the challenge inherent in the arrival of 'others' is limited to a contestation of collective identity. The others open up a perspective onto another We that fleshes out the universal in a different way. Basically, it is a moral universalism that warrants this opening.

By shifting the question of the constitution of the people to the question of history and identity, Benhabib actually forecloses the possibility of questioning who legitimately belongs to the people. As Näsström argues: 'Who legitimately makes up the people is not something that we may lawfully contest on this view.'[177] As will be argued in the remainder of this book, the refugee does exactly that: He challenges the legitimacy of our polity, calls into question the *right* we claim to select some as members while discard others as such. Indeed, if democracy cannot democratically decide its own limits, whence this right? If the first question of democracy, i.e., who belongs and who doesn't, withdraws itself from the process of mutual reasoning- giving, what, then, can be the *ground* for membership? And, what can be the *ground* of the right to select and exclude? To search for the ground of membership is, indeed, as Aleinikoff colorfully puts it, like searching for the Holy Grail. The right to have rights throws us all the way back to the origin, and does not settle with history as an answer. Instead, it casts doubt on the origin as a sufficient ground for the legitimacy of our living together as a people. Otherwise still, the right to have rights raises fundamental questions about our legitimacy and unity as a people, as it exposes the fundamental lack of ground at the origin of our existence as a people.[178]

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[175] Cf., Michelman (1996), p. 206.
[176] Ibid., p. , 207.
[177] Nasström (2007), p. 646.
[178] Compare, also, Michelman, who takes his cue from Claude Lefort: 'For, we are now somewhere in the neighborhood of Claude Lefort's widely noted definition of "modern democracy" as "a regime founded upon *the legitimacy of a debate as to what is legitimate and what is illegitimate"* - a debate which is necessarily without any guarantor and without any end.' Michelman (1996), p. 206.

Honig's paradox of politics ushers in groundlessness. The paradox expresses, time and again, that what is at stake in democracy is the unity and legitimacy of the people. And it explains the stakes of democracy by pointing out the ambiguities at the origins of a democratic polity.

Let's briefly consider, then, the constitution or foundation of a democratic order.

The constitution of order is brought about by the suspension -- or outright rejection -- of the existing order and the anticipation of a new order. Of course, those who take the initiative to found order do not, as Fitzpatrick reminds us, produce order as a 'sudden burst outside the process of time', but instead, present themselves 'as defenders of a history already accomplished'.[179] Indeed, as Lindahl points out in his incisive reading of the constitution of the European Union, the High Contracting Parties of the Maastricht Treaty (1975) expressed themselves to be 'determined to lay the foundations of an ever closer union among the peoples of Europe.'[180] So, in the claimed purpose to lay the 'bases of a future Europe'[181], the Treaty refers back to a past in which the peoples of Europe are already united. But the snag is, of course, that during the turmoil of founding, the European people do not yet exist as a unity. Instead, they are solicited as a legal and political unity on account of this very act of founding.

Importantly, the Treaty claims to lay the bases for a future Europe. It anticipates, that is, Europe as a new order. But, since this new legal and political order is not yet in place, but at the verge of its existence, it cannot, at the moment of founding, qualify the founding act as legitimate. But neither can the preceding order, which is suspended, disqualify this act as illegitimate. As an existing order is repudiated and a new order anticipated, the founding act hangs over the abyss.[182] At the moment of founding, therefore, the founding act is neither legitimate nor illegitimate but is, rather, as Lindahl says, *alegal*.[183] But, this is only justifiable if the founding act succeeds and establishes the legal framework that, in retrospect, appropriates this founding act and gives it its legitimacy.[184] Due to this alegality,

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[179] Fitzpatrick, P. 'Why the Law is also Nonviolent', Fitzpatrick, P. *Law as Resistance*, Hampshire/Burlington: Dartmouth Publishing Company Limited/Ashgate Publishing Company 2008, p. 156.

[180] As cited in: Lindahl, H.K. 'Breaking Promises to Keep Them', in Lindahl, H.K. ed., *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area Of Freedom, Security and Justice*, Oxford/Portland: Hart Publishing 2009, p. 151.

[181] The Maastricht Treaty recalls 'the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe.'

[182] According to Derrida, the founding act, therefore, reveals a 'mystique element' of law. What is the mystique, Derrida explains, is that at the moment of founding, the revolutionary act can neither be qualified as legitimate nor as illegitimate, as the laws that decide on this are suspended. The mystique in law is 'what in *droit*, suspends *droit*. It interrupts the established *droit* to found another. This moment of suspense, this *épokhè*, this founding or revolutionary moment of law is, in law, an instance of non-law ... it is the moment in which the foundation of law remains suspended in the void or over the abyss ...' (Derrida, J. 'Force of Law: The "Mystical Foundation of Authority", in Cornell, D., Rosenfeld, M., & Carlson, D. eds, Deconstruction *and the Possibility of Justice,* New York/London: Routledge 1992, p. 36.).

[183] Cf., also Weber, S. 'Taking Exception to Decision: Walter Benjamin and Carl Schmitt', in Kunneman, H. & De Vries, H., eds. *Enlightment. Encounters Between Critical Theory and Contemporary French Thought,* Kampen: Kok Pharos 1993, p. 150.

[184] Compare again, Derrida: 'A 'successful' revolution, the 'successful foundation of a state' ... will produce *après coup* what it was destined in advance to produce, namely proper interpretative models to read in return, to give sense, necessity and above all legitimacy to the violence that produced, among others, the interpretative model in question, that is, the discourse of its self-legitimation.' (Derrida (1992), p. 36.). Compare, also, Judith Butler: 'Mythic violence establishes law without justification for doing so, and only

legitimacy, Lindahl argues, only holds in retrospect: 'Indeed, the founding acts of legal order are themselves *neither legal nor illegal* because both terms of this binary distinction already presuppose a legal order as the condition of their intelligibility. Instead, foundational acts are *alegal* because they institute the distinction itself between legality and illegality. Only retrospectively, if they catch on, can they come to manifest themselves, albeit precariously and incompletely, as legal acts.'[185]

The founding act, which is ascribed to the people, is dependent upon the law it founds that first makes the people appear as a unity and casts their self-founding as legitimate. This intricate interplay between founding and what is founded, between the people and its laws, forecloses the possibility to ever decide what comes first: the people or its laws? According to Honig, this undecidibility is the chicken-and-egg problem of politics. The circularity involved in founding reveals, Honig says, 'law's formative power, its never fully- willed role in processes of subject formation.'[186] But, at the same time, the formative power of law brings law's powerlessness to awareness, as it can never fully consolidate the people as a unity and warrant its legitimacy. Though rising forth as a unity because of law, the people are never fully captured by law.[187]

But this implies that the act of founding is not only dependent upon what it founds, but also continues to be operative in the further existence of the founded order. Indeed, the foundation of order is not an already established and achieved fact; it is not crowned by fate or history and cannot be properly located at the dawn of history. Rather the act of founding is never over. There is, that is, no end to the foundation of order. Hence, there is the need to refound order, time and again. This refounding is not only necessary, it is also inevitable. In fact, it happens all the time. It happens whenever the law is applied. It happens with every act of law enforcement. For, as is well known, to apply or enforce the law, first of all, requires a decision to apply the law (or not). And, this decision is irreducible to the law being applied. With this irreducibility of decision, the founding act or power manifests itself again. For, the decision to apply the law (or not) not only sets the relation between law and this particular case it did not foresee. With the decision, law also unfolds back upon itself, reaffirms itself, as every decision sets the limits of law again and anew.[188] As Lindahl argues: 'Because there is no direct access to the unity of a collective, legislative acts can never only enforce the distinction between legality and illegality, and hence, never only enforce the unity of legal order. The legal qualification of human behavior also always involves an appraisal of what *counts* as (il)legality; it is also always an act that constitutes the boundaries, hence the unity, of a legal order. More precisely, boundary enforcement and constitution are

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once that law is established can we begin to talk about justification at all. Crucially, law is founded without justification, without reference to justification, even though it makes reference to justification possible as a consequence of that founding.' (Butler (2006), p. 203). Both Derrida and Butler comment here on Walter Benjamin's authoritative essay, *Zur Kritik der Gewalt* (1921).

[185] Lindahl (2008), p.125.

[186] Honig 2009, p. 25.

[187] Cf., Ibid., p. 23.

[188] For a philosophical inquiry into law, reality and decision see Nancy, J.L. 'Lapsus Judicii', in Nancy, J.L. *A Finite Thinking* (translated from French, ed. By Sparks, S). Stanford, California: Stanford University Press 2003, pp. 152-171.

always interconnected in such a way that, although one or the other is more prominent, neither is ever given in pure form.'[189]

It is this very originarity and irreducibility of law- *making* that rules out, as Honig would say, a binary opposition between the rule of law and the rule of man. Indeed, the Guantanamo trial showed, in an extreme form, that the granting of rights to refugees not only depended on law, but on the actions of men, as well. Thomas Spijkerboer draws a similar conclusion after critically analyzing case law on family reunification of the European Court of Human Rights: '[L]egal argumentation – even in its most technical form -- is inconclusive.'[190] And, this opens up the possibility, he argues, that social movements can influence legal argument: 'If a social movement succeeds in establishing a relatively radical view as credible, the centre of the debate shifts, possibly taking the courts along. All that courts need is an innovative way of dealing with the technical issues that allows for shifting to the new centre.'[191] Spijkerboer here expresses that – to use Honig's terms – proceeding from law does not exclude taking law in different directions. Law's requirement to make unity out of plurality relies on something that is not implied, not contained in law. The outcome of law – a univocal decision or sentence – relies upon a decision that, as said, is irreducible to law. Put differently, the rule of law is always implicated in a decision that can never be fully recuperated by law, which evidences, Honig says, that the rule of law is always dependent upon the rule of man. Hence, Honig argues that '[p]erhaps somewhere between the rule of law and the rule of man we might … find or enact the rule of man or people: plural and riven, plainspoken and arcanely technical, lawlike and lawless, all at the same time.'[192]

But if there is no such thing as a binary opposition between the rule of law and the rule of man, as Honig says herself, it is equally worth stressing that the latter depends on the former as well. That is, to apply the law is, indeed, to apply the law. And even though application involves a decision that disrupts the logical extension of the rule to the case, leaving the decision undetermined by legal principle,[193] one cannot but link up with the already established meaning of the law if one, as Lord Radcliff famously tells, wants to be a wise man in practice.[194] But, there is more to

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[189] Lindahl, H.K. 'A-Legality: Postnationalism and the Question of Legal Boundaries', *The Modern Law Review*, vol. 73 (2010), p. 45

[190] Spijkerboer, T. 'Structural Instability: Strasbourg Case Law on Children's Family Reunion', *European Journal of Migration and Law*, vol. 11 (2009b) p. 291.

[191] Ibid., p. 292.

[192] Honig 2009, p. 86. Honig is arguing here against the hegemony of law over life and political action, and the concomitant fiction of the neutrality of the law that supposedly solves all problems without considerations of antagonistic interests, irreducible decisions, conflicts or struggles. Already in 1976, Bankowski & Mungham made a similar argument. Embedded in a Marxist critique of bourgeois society and its laws, they argued against the self-reproducing and self-directness of law 'in the style of a hermaphrodite', acting as if antagonism, conflict, arbitrariness and politics are out there. (Cf. Bankowski & Mungham, *Images of Law*, London, Henley & Boston: Routlegde & Kegan, Paul 1976, p. 34). And like Honig, but even more radical, they aimed at giving power back to the people by making law irrelevant for the solution of conflict (Cf. Ibid., p. 29).

[193] Cf., Van der Walt, J. *Law and Sacrifice. Towards a Post-Apartheid Theory of Law*, London: Birkbeck Law Press 2005, p. 191.

[194] Lord Radcliff – who Bankoswki and Mungham cite in their *Images of Law* – points out the difference between a prospective and retrospective boundedness to law: '[The judge] had to ascertain, interpret, here admit and there reject the rules of custom. He has had to interpret and apply, sometimes to enlarge upon, sometimes to confine, enacted laws … We know all this, it is commonplace among lawyers. It recognizes, of

the dependency of the rule of man on the rule of law than Lord Radcliff's concern for the principle of legality. The dependency not only holds in retrospect, but in prospect, as well.

If we imagine the world otherwise, and claim a new law that brings the world into being as we imagine it should be, we already presuppose the legitimacy of what we are pursuing. That is, the world we seek to bring into being is both presupposed and pursued. Indeed, recall that founding – or law- making power – is always dependent upon what it founds. The dependency evidences that we can never leave the everyday order of law and return to a pure state before the law where the origin lies sparkling as a jewel. That one cannot but link up with the law, therefore, implies that the multitude, whose power Honig stresses, cannot present itself as a multitude. We can, in other words, never directly behold plurality. We always adopt a parallax view, so to speak, to the infinite range of possibilities that have been excluded, marginalized and repressed by the current favoring of one particular possibility. Every new claim, mindful of and intimating plurality while imagining a new and better world, cannot but present itself – in prospect – in law's name, and use its very terms. *There is no going back before the law*. As will become clear in the next chapter, facticity has to do with exactly this. Without a polity's understanding of its facticity, proximity in Honig's sense, will not register, thus will come to no avail for refugees. As will be argued in the next chapter, facticity brings a more *radical contingency* into view. Facticity and radical contingency will explain why a polity cares for the one who has lost his place in this world and can no longer say 'We.'

course, the judge's law-making capacity, a capacity which only judges themselves, and that for excellent reasons, are likely to dispute. It is to me a matter of great surprise that so much ink has been employed by commentators in demonstrating this fairly obvious conclusion. If judges prefer to adopt the formula – for that is what it is – that they merely declare the law and do not make it, they do no more than show themselves wise men in practice. Their analysis may be weak, but their perception of the nature of law is sound.'[194] And if the judge proves himself to be a wise man in practice it is because he cannot but claim that he applied the law that was declared beforehand (which is, of course, the principle of legality). (Lord Radcliffe as cited in: Bankowski & Mungham, 1976, pp. 44, 45).

4

A Finite We

The refugee who stands at the door always challenges the receiving community. Whatever legal obligations states have with respect to refugees, human rights law and refugee law do not prevent that the arrival of the refugee is unsettling, perhaps even experienced to be threatening, as it makes us, as members of the polity, feel insecure.

Notwithstanding their differences, reciprocity and proximity try to make sense of this challenge against the backdrop of a polity's contingency. Contingency is but the reverse side of the requirement of democratic closure. To say that a people's freedom is necessarily spatially limited is to say that democratic legal order is inherently contingent. As it is related to the limitation of freedom, contingency features the finitude of a democratic people. [1] Finitude arises from what Lindahl coins as the basic achievement of legal order which is 'to limit the unlimited': 'To the extent that the basic achievement of legal order is to limit the unlimited, exclusion has a positive significance, for, without it, no legal order would be possible; but this achievement is irreducibly ambiguous, for, exclusiveness also ensures that no legal order ever succeeds in fully consolidating itself … in a word, legal orders are irredeemably *contingent*.' [2]

By drawing attention to inclusion and exclusion, Lindahl highlights that democratic legal order is not given in advance and ready-made, but is instead, *brought about*. That order is brought about implies that things and persons *are not always already ordered*, thus refuting the claim of a natural order in which things and persons are assigned and fixed in a place of their own where they properly and naturally belong (and should return to). Rather, what 'precedes' order is the unlimited that is in need of limitation. What 'precedes' is, as Waldenfels says, the

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[1] Compare Lindahl (2008), p. 212: 'Indeed, a common interest is always determinate: Some interests are selected as worthy of legal protection and others discarded, usually implicitly, as legally irrelevant. That the material sphere of validity of legal norms and orders is bounded means, therefore, that only a finite range of rights and obligations is made available by any given legal order, because these rights and obligations give legal content to a bounded common interest.'

[2] Lindahl (2008), p. 126.

unordered that is brought to order.[3] The unlimited or unordered that 'precedes', signals that 'before' order, an infinity of multiple ways to go exist, only one of which can be selected for the time being. Every order is, therefore, provisional, hence questionable, as it fails other possibilities to which it relates as possibilities it did not choose. The 'not' compromises the negativity of order. Importantly, negativity here reflects a privative reasoning, as it refers to the taking away or exclusion of multiple possibilities in favor of one particular possibility that unavoidably fails all the others. Finitude, thus, appears as deprivation, i.e., as a regrettable but necessary failure with respect to an infinite range of possibilities. Finitude, in short, derives from infinity. Finitude (contingency) thus understood, allows for a contestation of order in the name of possibilities that have been forgotten, marginalized and repressed. Finitude is the reminder, so to speak, that another way of limiting the unlimited, of ordering the unordered, is possible.

But there is more to finitude than the necessary limitation of freedom. The challenge inherent in a claim to asylum brings a different (though related) finitude into view. The refugee deepens our sense of finitude, as his mere presence reflects the possibility of the *absence* of a We. As argued in the previous chapter, the refugee reminds us of the possibility of the *not-being* of a We. Not-being and absence put into doubt that finitude is exhaustively dealt with when thought of as the limitation of freedom. Indeed, the finitude that comes into view with the question of asylum is not just a deprivation that allows for the *passage* to another We. The finitude that comes along with the refugee is, rather, the *end*.

The possibility of the not-being of a We, therefore, not only attaches to the refugee who has experienced the *death* of a We, both as the cause and effect of his flight. That the absence of a We is possible gets to us because we 'know' this possibility also fundamentally belongs to our own existence as a people. Indeed, the right to have rights raises the question how the possibility of not-being bears upon ourselves as a people. This is, ultimately, the question of the We's finitude.

This chapter argues that radical finitude is the ultimate perspective of a political care for the collective self that Honig invokes in her *Emergency Politics*. To take care of the self is to be concerned for one's own being, one's own existence. Indeed, what makes a people sovereign is this very concern for its own existence. Concern, therefore, sheds light on the self that is at issue in the sovereign right of a people to determine and rule it*self*. This chapter aims at the self in order to bring about the democratic We as and in its finitude. The next chapter argues that a democratic We can give effect to the right to have rights on account of its radical finitude.

To expound finitude, I will elaborate a theory of collective selfhood, starting with the distinction between identity as sameness and identity as selfhood. This double concept of plural identity allows me to embark upon the most challenging part of the thesis: a reflection on the mode in which the people can be said to exist as a self. The argument is cast in the mold of a new reading of Heidegger's Dasein. Whereas most Heidegger interpretations tacitly assume that singular existence is the paradigm case of Dasein, I will try to make a case for human plural existence as typified by the polity to be analyzed as Dasein. I will reflect on three issues that are

[3] Compare Waldenfels 1996, p. 1: 'If orders are not accepted as ready- made and hypostasized, their selective and exclusive achievements presuppose something that comes to order and that precedes them as something to be ordered.'

of direct relevance for the topic of this thesis so as to gain (i) a better understanding of *facticity* with which I closed the previous chapter; (ii) a clearer-cut difference, hence interdependence, between representation and reflexivity, or between improper and proper understanding; (iii) insight into finitude as it directs the concern and order of Dasein-in-the-plural; and (iv) an appreciation of the mood that is inherent in this finite mode of existence, to wit, collective angst or a shared sense of insecurity. This inquiry into facticity, self-understanding, death and mood renders the concept of popular sovereignty more vulnerable and fragile.

4.1 Reflexivity and the Sovereign Self

A chain of quotations hailing from Benveniste, has it that popular sovereignty is bound to introduce representation since, as Waldenfels formulates the problem, 'there is no we that can say 'we.' 'We' is always said by 'representatives' or 'mouthpieces', using it in an inclusionary way.[4] I will not doubt this linguistic phenomenon, only ask why this is so. The answer, I venture, pertains to the ontology of self; in our case, the plural self. This self does not exist as an entity over the first person being represented. On the contrary, the 'self' is shorthand for the relationship between a first person and her thinking of herself *qua* first person. This is why reflexivity is always bound up with representation. Vice versa, without represented identity also being reflexive, the theory of popular sovereignty cannot deliver according to its promise, namely the promise to solve the problem of how we can comply with political authority, and yet be free.

My inquiry into collective identity, therefore, takes identity in a reflexive modus. Note that reflexivity in this sense has little to do with a critical reflection on collective identity which Benhabib bears out when she calls for reflexive processes of collective identity transformation. Benhabib would like us to believe that this transformation, in the final analysis, comes along with a certain ease, as the challenge that incites the transformation safely sits on a democratic people's own universal principles. Reflexivity, however, puts doubt on this ease, as it brings into focus a people's attachment or belonging to its identity.[5] Recall that, on Benhabib's account, the other 'dares' us as he questions our embodiment, our materialization

[4] Cf., Waldenfels, B. *Vervremdung des Moderne,* Essen: Waldstein Verlag 2001, p. 140. Waldenfels is quoted in Roermund, B, van. 'The Law and 'We", Ethical *Perspectives: Journal of the European Ethics Network,* vol. 13 (2006), p. 530.

[5] Rudi Visker offers a profound account of the unease and discomfort that emerges whenever we are confronted with others who differ from us in almost every aspect of their lives. The other unsettles us, not merely because he shows us a different way of living, but because he or she makes us aware of our attachments. He or she unsettles us not because he or she incites a process of identity transformation, but rather brings our own attachments into experience by reason of which we cannot change ourselves. Compare Visker, R. *The Inhuman Condition. Looking for Difference after Levinas and Heidegger*, Dordrecht [etc.]: Kluwer Academic Publishers 2004, pp. 289, 290: 'I can, of course, to a certain extent, admit that mine is not the only set of values possible. But having granted this, I cannot but add: and yet, they are the only ones possible *for me* … At first sight, the situation thus described seems to fit nicely what is known as 'tolerance': a willingness to bear what one does not approve of, or indeed positively rejects. But there is a complication: for the weight we have to bear does not simply come from what we cannot respect in the Other, it also involves the weight our own values impose on us. In other words, the tension is not simply an inter-subjective one, it is intra-subjective, deriving from the Other confronting us with a question to which we fail to come up with an answer: what is it that makes these values, this *Existenzweise* my own (our own)?'

of the universal. He challenges, I argued, what matters. This turn of phrase catches what is at stake with reflexive identity, as it raises the question *to whom* these things matter.

In *Oneself as Another,* Ricoeur aspires to this question. For, how, he asks, can we ask about *what* matters if we forget to ask *to whom* it matters.[6] The values the other challenges are not just values that happen to befall us due to a concurrence of historical circumstances. They are, more intimately, *our* values, they *belong* to us. The other may challenge whatever it is we are, but, as Agamben perceptively argues, 'whatever being' is not indifferent being, it does not matter which, but being such that it always matter.[7]

There is a difference, therefore, between identity as referring to what we are, and identity such that it always matters what we are. In the first case, identity refers to what we are that is set up by excluding what is other and different, and that can be compared accordingly. In the second case, identity revolves around our *relation,* our *belonging* to whatever it is we are. This time, identity reflects that, as Waldenfels says, '[t]he personal pronoun is continued in the possessive pronoun, and the privileging of the 'I' is strengthened to a privileging of what is 'mine'.[8] And, what is ours is key to understanding what it means to exist as a self. What is at issue in being a self is not only what we are, but also, and more importantly, who we are. We experience the difference whenever we look in the mirror or see our image reflected in a window.[9] For, what I see is *myself;* I recognize the mirror-image as my *own* image. This is actually quite bewildering. For, I see *myself* in something that I am *not*.

Perplexity continues to hold if matters are taken to the level of the plural self. The question of the self was already at issue with Honig's paradox of politics. One of the lessons to be drawn from this paradox is that the democratic We is not a subject that nicely fits the identity ascribed to it. Or, to say the same thing differently, the We is not a subject *on the ground of which* an identity can be ascribed. For this would be to presuppose that whatever quality or property is held to be true for the We is already present within the We-subject. Otherwise still, the identity, properties, predicates ascribed to the We would *correspond* to the We as subject. Identity as *sameness* amounts to this. Taking the We as a subject makes the subject of democracy – We, the people – to be in an endless search for its true, authentic and original identity that it always risks losing when playing the game of

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[6] Cf., Ricoeur, P. *Oneself as Another* (translated from the French), Chicago/London: The University of Chicago Press 1994, p. 137.

[7] Cf., Agamben, G. *The Coming Community* (translated from the Italian), Minneapolis: University of Minnesota Press 1993, p. 1.

[8] Waldenfels 1996, p. 77.

[9] The difference is also famously at issue in Musil's *Der Man ohne Eigenschaften.* Ulrich, the protagonist who is called the man without qualities by his friend Walter, is not, to be sure, without qualities. In fact, he is very well aware of his qualities. He won't deny that he is male, young, white, born and raised in this particular time and place, gifted with a bright intellect, and so forth. To answer the question, what he is, is relatively simple for Ulrich. But, what troubles him is that the question, who he is, is not answered by a sheer enumeration of all his qualities which he, no doubt, shares with numerous others. What causes Ulrich's uncanniness, and what makes him feel ill at ease, is that he is not entirely sure, as he himself says, how he belongs to his qualities and they to him. (And, of course, what makes *Der Man Ohne Eigenschaften* such an intriguing piece of literature is that Ulrich's quest for himself runs parallel to Austria-Hungary's disarray about itself, and its attempt to find itself again in the ruins of its identity).

representation. With the paradox of politics it is, rather, the other way around: We, the people rises forth, emerges from the identity claimed for it. The We is not first; it comes after. As will become clear in this chapter, that the We is not a subject is but another way of saying that the We is not the ground for democratic legal order.

But if the We is not so much the cause but rather the effect of politics, the question is: how can it recognize the identity claimed for it as its own? What is its own is precisely what matters. But what is its own is, at the same time, far from self-evident, if only because it relates to, and arises from, what is not oneself. Hence, the people's *concern* for its *own* existence. Indeed, concern and what matters are key in understanding what it means for a people to understand and establish its self. 'Does not', Ricoeur asks, 'the question about what matters or not depend on self-concern, which indeed, seems to be constitutive for selfhood?'[10]

The issue of sovereign *self*-determination thus urges an inquiry into the existential-ontological category of the own. Clearly, the own crops up whenever the people's identity is at issue. But it is on account of the own – or the proper – that the question of identity remains somewhat unresolved, and even makes us feel uncanny, as it is not simply a matter of answering it in terms of what-ness. What we are is always, in a way, plainspoken and familiar. But what is familiar is not what is most our own. For what is our own raises the question, how we relate to what we are, how we deem our identity to be our own, causing what we thought was familiar to appear as unfamiliar and not ourselves.

So, what is at stake with the own or the proper is the grasping of the We as a self. Only if the We recognizes everything it is as properly belonging to it, does its self arise. The own is what enables us to exist as a self, by our self and for the sake of our self.[11] In his essay, '*Ex Nihilo Summum* (Of Sovereignty)', Jean-Luc Nancy therefore argues that sovereignty centers around the relation of the people to its identity and, hence, the 'consequence consists in referring to the sovereign the constitutive problematic of the relation to self or of auto-position in general.'[12]

To tease out this reflexive relation is not just an idle matter of splitting hairs. On the contrary. The stakes involved in raising the question what it means for a people to exist as a self are high, if only because it unravels the linguistic phenomenon that a we can never say 'We' as a genuine ontological problem. Moreover, the focus on the self allows for a deconstruction of the opposition between direct or participatory democracy, on the one hand, and indirect or representative democracy, on the other, -- if by deconstruction we mean exposing the predominance and favoring of one of the terms of the opposition over against the other in order to subsequently question this predominance.

As is well known, direct democracy, even though practically infeasible, clearly enjoys a theoretical primacy over against representation which is said to be a

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[10] Ricoeur 1994, p. 137

[11] On the relation between the own, the self and reflexivity see also Agamben's essay '**Se*: Hegel's Absolute and Heidegger's *Ereignis*', in Agamben, G. *Potentialities. Collected Essays in Philosophy* (translated from the Italian), Stanford: Stanford University Press 1999, pp. 116-137.

[12] Nancy, J.L. '*Ex Nihilo Summum* (Of Sovereignty)', in Nancy *The Creation of the World. Or Globalization* (translated from French, D. Pettigrew & F. Raffoul (eds.)), New York, Albany: State University of New York Press 2007, p. 99.

second-best option derivative of the former.[13] At first glance, popular sovereignty seems to establish this primacy of direct democracy, as it expresses that the people is both the author of laws and the interested party thereof. To say that 'the people rules over the people' is to presuppose, first, that the people is originally present, and second, partakes in the process of legislation. Van Roermund instructively summarizes this common reading of popular sovereignty and democracy: 'Rousseau's phrase that law is law if and only if "the whole people rules over the whole people" is commonly read in what we may call the co-referential thesis (CT). Roughly put, CT states that law can only be law if 'rulers' and 'ruled' are co-referential terms. They refer to the same set of people, who are supposed to rule what they want and do what they ruled.'[14] This common reading builds on a notion of identity in terms of *sameness*. Decisive in this respect is not, or at least not only, that the people is identified according to a limited set of criteria, establishing a substantive and homogeneous polity in which all members share in the same identity. The point of the matter is, rather, that those who rule and those who are being ruled are the same. Again, what is presupposed is the original presence of the people, which is lost, however, in the representation of the people to which we resort for all kinds of practical reasons, and which hamper that we may all engage in the political and legislative process. Yet, if it is true that the only and true meaning of popular sovereignty is that 'the people rules over the people', then direct democracy continues to guide what indirect democracy is supposed to do, namely to *re*-present the people, that is to make present again the people that has been lost in representation. So, the ultimate aim of democracy is to regain an original presence. On this account, the people can be said to be in an endless search for its original, true and authentic identity. According to Nancy, the political tradition of the West comes down to this: 'Until this day, history has been thought on the basis of a lost community – one to be regained or reconstituted.'[15]

However, the primacy of direct democracy negatively impacts upon the issue of asylum. More specifically, this general account of popular sovereignty and democracy causes us to end up in a deadlock whenever the right to have rights is at issue. Recall, in this respect, Seyla Benhabib's attempt to reconcile popular sovereignty and human rights as discussed in Chapter Three. Admittedly, Benhabib claims to have proceeded from representative democracy.[16] But, there is little doubt that her argument relies upon a 'preference in the opposition' of direct democracy, as discourse ethics proceeds from the assumption that only those norms and institutions are valid if those who are affected by them can participate in their articulation. But, if direct democracy is the measure, this implies that the rights of those who do not belong to the democratic We of which they seek membership, and who, for that very reason, are excluded from the process of norm articulation, can only be referred to the moral realm. Against the backdrop of a

[13] For a critical account of this general understanding of the relation between direct and indirect democracy see Lindahl, H.K. 'Rechtsvorming als politieke representatie: de kwestie van constitutionele toetsing', in Broers, E.J. & Van Klink, B. *De rechter als rechtsvormer*, Den Haag: Boom Juridische Uitgevers (2001), pp. 173-196.

[14] Van Roermund (2006), p. 531.

[15] Nancy, J.L. 'The Inoperative Community', in Nancy, J.L. *The Inoperative Community* (translated from the French, Connor, P. ed.), Minneapolis/London: University of Minnesota Press 1991, p. 9.

[16] Cf. Benhabib 2004, pp. 217-220.

theoretical favoring of direct democracy, the right to have rights can only be morally grounded and appear as a moral right, which, as argued in Chapter Two, is no right at all, but a privilege subject to the whims of the sovereign. The referred primacy thus enmeshes us in the loop that the right to have rights cannot be politically grounded unless those who claim it are already in and join discourse about it, in which case it is wholly redundant to claim it.

Does this mean that the right to have rights is nothing but the expression of a vague hope, or worse, an exercise in cynicism? After all, given the sovereignty of the people, it seems difficult, if not impossible, to move away from the primacy of direct democracy. Questioning this would be tantamount to renouncing a people's freedom which is at the core of the right to determine and govern itself.

Or, so it seems. For if sovereignty is indeed to guarantee the freedom of the people, then it is insufficient to say that the people rules over the people. As Nancy argues in his short essay on sovereignty, '*Ex Nihilo Summum'* (Of Sovereignty), what the formula 'the people rules the people' misses is, precisely, that the people is sovereign, i.e., that the people rules *itself*.[17] For freedom to be guaranteed, it is not enough that those who rule and those who are being ruled are the same. It is also, and above all, required that the people recognizes the enacted laws as its *own* laws. It is here that reflexivity kicks in. As Van Roermund argues: 'Felicitously, CT is not the only reading possible for Rousseau's phrase; a second and much neglected reading is as feasible as the first one. When in lawmaking, the whole people rules over the whole people, this amounts to the whole people ruling over *itself*. Let us formulate this understanding in the Reflexivity Thesis – both the normativity and the validity of law lie with its rulers (legislators) ruling on themselves. RT opens up a new horizon of questions … If the basic tenet of *Rechtsstaatlichkeit* is that rulers rule over themselves, we are in fact dealing, at the core of legislative action, with a sense of 'identity' different from the one presented in CT. We will have to inquire into political meaning of *ipse* rather than *idem*, of selfhood rather than sameness […].'[18] Paradoxical as it might appear at first glance, it is exactly identity as selfhood that is open to the specific challenge inherent in a claim to asylum. As this chapter and the next argue, self-concern and what is most our own 'ground' a right to (seek) asylum.

The reflexive notion of identity Van Roermund here invokes, expresses that popular sovereignty articulates that the people is reflexively defined as being concerned for its own being. It is in exactly these terms that Martin Heidegger tries to capture human existence for which he coins the notion of *Dasein*. So, in *Being and Time* (1927)[19] human being as *Dasein* is reflexively defined as the being for whom its *own being* is at issue. For Heidegger, the question about our own being – which is captured by the notion of *Eigentlichkeit* – comes down to the problematic of selfhood. In fact, it is the very problematic of the self that prompts the move away from human being as subject, on whose ground a substantive identity can be ascribed, and to coin the notion of *Dasein* to denote human existence. So, in

[17] Cf. Nancy 2007, pp. 96- 109.
[18] Van Roermund (2006), p. 533.
[19] Heidegger, M. *Being and Time* (translated from the German), Oxford/Cambridge: Blackwell Publisher, 1962. Hereafter referred to as BT; Heidegger. M. *Sein und Zeit*, Tübingen: Max Niemeyer Verlag 2001. Hereafter referred to as SZ.

Pathmarks, human being is defined as the being that 'gives rise to itself as a *self*… Dasein exists in such a way that it exists *for the sake of itself*.'[20]

I will seek to demonstrate the political relevance of the exposition of *Dasein* as Heidegger elaborates in *Being and Time*. To be sure, Heidegger did not write a political philosophy himself. In fact, Heidegger's understanding of the selfhood of Dasein has caused many to believe, under the influential criticism of Arendt, that *Being and Time* is entirely inapt for thinking about politics and law. In 'What is Existential Philosophy?' (1946) Arendt, who was a student of Heidegger, implacably dissects Dasein as the opposite of man. As it exists for the sake of itself, plurality and sharing a world together with others of its kind – which is what makes us human – do not belong to the ontological make up of Dasein. In Heidegger, Arendt says, 'being-a-Self has taken the place of being human.' [21] Arendt's dissection of Dasein does not stop here. Not only is the question of the meaning of the self at once inapt for political philosophy, it is even dangerous. For what constitutes the most severe threat to politics, Arendt later argues in *The Origins of Totalitarianism*, and what even proves to be the condition *sine qua non* for a totalitarian regime to develop, is the existence of completely isolated, disconnected selves who have lost their sense (their common sense as well as their *sensus communis*) of sharing a world.[22] The only way to reconnect these isolated selves, Arendt's argument continues, is to mold them into the iron bond of totalitarianism in which family members, friends and neighbors are willing to betray each other in order to be loyal to the Party.[23]

It is no mere coincidence that Arendt, only a few years before *The Origins* was published, uses similar words and arguments to attack Heidegger's philosophy. At that time, academic philosophy had become a personal problem for Arendt, who escaped national-socialism and, eventually, found refuge in the United States. She was haunted by the possible relation between thoughts and the catastrophic events, and in particular by the question whether Heidegger's political erring, i.e. his commitment to the Party and active involvement in the *Gleichschaltung*[24] could be traced back to his thinking.[25] Shortly after the war, Arendt seemed to have little doubt that this was indeed the case. Clamping the essential character of human existence to absolute self-ness, all that remained for Heidegger to reconnect these

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[20] Heidegger, *Pathmarks* (translated from the German), ed. W. McNeill Cambridge: Cambridge University Press 1998 p. 121. Hereafter referred to as PM.

[21] Arendt, H. 'What is Existential Philosophy', in Arendt: *Essays in Understanding 1930 -1954.-Formation, Exile and Totalitarianism* (ed. J. Kohn), New York: Schocken Books 1994, p. 181.

[22] Cf., OT pp. 323,324.

[23] Cf., ibid, p. 307.

[24] Indeed, when Arendt, in the famous interview with Gaus from 1964, explains that what shocked her about Hitler's rise to power was not what her enemies did, but what her friends did she certainly had Heidegger in mind. Compare Arendt, H. 'What Remains? The Language Remains: A Conversation with Günter Gaus', in Arendt: *Essays in Understanding 1930 -1954.-Formation, Exile and Totalitarianism* (ed. J. Kohn), New York: Schocken Books 1994, pp. 10, 11: '[F]riends 'co-ordinated' or got in line. The problem, the personal problem, was not what our enemies did but what our friends did. In the wave of *Gleichschaltung*, which was relatively voluntary – in any case, not yet under the pressure of terror – it was as if a relatively empty space formed around one. I lived in an intellectual milieu, but I also knew other people. And among intellectuals *Gleichschaltung* was the rule, so to speak. But not among others. And I never forgot that. I left Germany dominated by the idea – of course somewhat exaggerated: Never again! I shall never again get involved in any kind of intellectual business. I want nothing to do with that lot.'

[25] Cf., also Critchley, S. 'Originary Inauthenticity – On Heidegger's *Sein und Zeit*', in Critchley, S. & Schürmann, R., *On Heidegger's* Being and Time', Routledge, London [etc], 2008, p. 140-141.

entirely disconnected selves, Arendt contends, was to 'draw on mythologizing and muddled concepts like 'folk' and 'earth' in an effort to supply his isolated Selves with a shared, common ground to stand on. But, it is obvious that concepts of that kind can only lead us out of philosophy and into some kind of nature-oriented superstition.'[26]

Within a few years, however, Arendt's resolute rejection of Heidegger grew cold. In a lecture delivered in 1954 to the American Political Science Association, Heidegger is staged as one of the few philosophers who abated Arendt's vexation with a tradition of philosophy which obdurately ignored the fact that the world is inhabited by men in the plural. Heidegger's thinking, she said, might offer a fruitful contribution to a philosophical concern with politics: 'It lies in the nature of philosophy to deal with man in the singular, whereas politics could not even be conceived of if men did not exist in the plural … It may be – but I shall only hint at this – that Heidegger's concept op 'world', which in many respects stands at the center of his philosophy, constitutes a step out of this difficulty. At any rate, because Heidegger defines human existence as being-in-the-world, he insists on giving philosophical significance to structures of everyday life that are completely incomprehensible if man is not primarily understood as being together with others.'[27]

Indeed, against the isolating tendencies in Dasein that Arendt rebuffed in the early years, it could be reasonably argued that plurality is not excluded from the ontological make up of Dasein. Heidegger indisputably argued that being-with [*mitsein*] fundamentally belongs to Dasein.[28] '*Mitsein*' and 'world' are at the center of contemporary political reorientations of Heidegger as launched, in particular by Giorgio Agamben, Simon Critchley and Jean-Luc Nancy.[29] However, reading plurality into Dasein so as to make it relevant for the question of community differs

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[26] Arendt 1994, pp. 181-182. Indeed, what equally presses the debate about Heidegger's political erring is the way *das Volk* appears in *Being and Time*. Dasein, Heidegger says, shares in the fate of its people 'to make up the full authentic historicizing of Dasein.'(BT, p. 436). This opposes the isolating tendency that troubled Arendt so much, as the referred passage from *Being and Time* seemingly supposes that Dasein is preceded by *das Volk*. Also, and more disturbingly, it suggests that Dasein partakes in a history imposed by fate of a people who drives at its future by seeking to regain its origins (Cf., Esposito, R. *Communitas. The Origin and Destiny of Community* (translated from the Italian). Stanford: Stanford University Press 2010, pp. 97, 98.) From the authentic historicizing of the people it is only a small step to 'the destiny of the German people' which Heidegger invokes in his notorious *Rektoratsrede,* and his praising of the 'inner truth and greatness' of the national-socialist movement in *Einführung in die Metaphysik* (Cf., Heidegger, *Introduction to Metaphysics* (translated from the German), New Haven & London: Yale University Press 2000, p. 213).

[27] Arendt, H. 'Concern with Politics in Recent European Philosophical Thought', in Arendt: *Essays in Understanding 1930 -1954.-Formation, Exile and Totalitarianism* (ed. J. Kohn), New York: Schocken Books 1994, p. 443.

[28] Compare BT, pp. 154,155: '[T]he world is always already the one that I share with others. The world of Dasein is a *with-world*. Being-in is *being-with* others.'

[29] In order to make the existential analytic of Dasein relevant for a reflection upon the question of community, it could be argued that *mitsein*, to which Heidegger dedicates only a few pages, should be radicalized. This is indeed the project Nancy undertakes. Arguing that plurality is not at odds with Dasein, Nancy seeks to formulate the implications of finitude for the being-with of Dasein, as 'Dasein's "being-towards-death" was never radically implicated in its being-with – in *Mitsein* – and that it is this implication that remains to be thought.' (Nancy 1991, p. 14). Compare in this respect also Esposito's Heideggerian understanding of plurality: '[H]eidegger refers to the originally singular *and* plural character of a shared existence, which is properly ecstatic: each opens to all, not despite of but *inasmuch* as single, the contrary of the individual … [T]he other is already *with* the one given, on account of the fact that there is no one without the other. In this sense, a "we" cannot even be spoken of that isn't always "we-others". For Heidegger, this means beginning not with "me" or with "not-me", but with *cum*, with "with." ' (Esposito 2010, p. 94).

from the approach taken here. Proceeding from the reflexive structure of popular sovereignty, I will try to come to an understanding of the political implications of Heidegger's move from subject to Dasein[30], by way of exploring what it means for a We to exist as a self. As will become clear in the pages that await us, to exist as a self means to exist finite. Importantly, the finitude that comes into view with selfhood moves beyond the finitude that results from inclusion and exclusion that is to limit the unlimited. As I aim at collective selfhood, I will not, as said, let *mitsein* sway Dasein. Instead, I will reread the existential analytic of Dasein from the perspective of the first person plural.

4.2 Introducing Dasein: the Question of Being

Let me try and open up a point of entry for those unfamiliar with Heidegger. This preparatory section briefly discusses the question of Being which is central to Heidegger's thinking.[31] As painstaking as this question may be, some understanding of the stakes involved is required, as it is this question that first constitutes human existence as Dasein, and second, establishes Dasein as finitude. What is not entailed in Dasein, however, is that human existence should be preferably analyzed as singular, individual existence.

A shortcut to Heidegger, then, would say something like 'Heidegger's thinking is concerned with Being, centers around the question of Being.' In itself, such a shortcut says nothing, if only because it seems rather counter-intuitive that Being, a simple and indispensable verb in our languages, can pose a problem for thinking at all. In all kinds of human affairs, ranging from philosophy and the sciences, to politics and law, and to our everyday dealings with things, we do not aim at Being. Instead, we concern ourselves with all sorts of things in the world, which we handle, use, take care of, analyze, investigate, identify, decide and establish properties of. As Van der Walt points out, especially when it comes to law, it seems that 'there is hardly anything else … that marks itself as so thoroughly concerned with the fully defined and identified aspects of things.'[32]

Now, Heidegger's main point of argument is that we are so accustomed to, so busy with and caught up by things and their properties – whether it is the pen we use to write a paper, a case of law we have to decide, or a metaphysical inquiry into

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[30] I, thus, take seriously a suggestion made by Lacoue-Labarthe, who pointed to the possibility of a political reading of Dasein. Cf. Lacoue-Labarthe, Ph. 'In the Name of …', in Lacoue-Labarthe, Ph. & Nancy, J.L. *Retreating the Political* (translated from French), ed. S. Sparks, London: Routledge 1997, pp. 55-86. With this suggestion, Lacoue-Labarthe responded to a very young Derrida who, in 'The Ends of Man', repudiated *Being and Time* because of a slumbering predominance of the We. This predominance resulted in a favoring of the intimate and the known, the familiar and the own, and the *Heimat* (Cf, Derrida, J. *The Ends of Man*, Oster Bay: State University of New York Conference Center 1968). Levinas, as well, discerned a 'superstition of place' in Heidegger, imputing to him a reactionary attachment to and rootedness into place, into the soil, which cannot but end in the dangerous distinction between the members of the nation born out of the soil and strangers (Cf. Levians, E. 'Heidegger, Gagarine et nous', *Difficile liberté*, Albin Michel (1963), pp. 255-259).

[31] Importantly, it is the question of Being as expounded by Heidegger that has recently been taken up by legal scholars. Cf. J. van der Walt, J. *Law and Sacrifice. Towards a Post-Apartheid Theory of Law*, London: Birkbeck Law Press 2005. And also Oren Ben-Dor. *Thinking About Law in Silence with Heidegger*, Oxford/Portland: Hart Publishing 2007.

[32] Walt, van der J. 'The Murmer of Being and the Chatter of Law', *Social and Legal Studies*, forthcoming 2011.

the nature of the human being -- that we simply forget that there is more to things than identifying and objectifying their aspects. We are, Heidegger argues, *oblivious* of Being, as we experience things all too easily in an objectified sense. But to raise the question of Being is not to say that we should search for Being apart from, before or above things. To be sure, Being is always the Being of beings; without beings, Being is Nothing. Being and beings belong together, -- though not in the sense that Being is a specific, excellent sort of *a* being that can be ranged and classified among beings, for example, as the Highest being that grounds all other beings, giving them their sense and direction. Being is not *a* being. We can never say of Being that it *is*, that it is some-thing present, accessible and intelligible. Strictly speaking, Being *is* not. Or, in a different philosophical idiolect, 'existence' is not just another predicate, if it is a predicate at all, in the logical sense of the word. Neither is it a quality or property added to something.

To make more tangible what is at issue here and what we are otherwise so oblivious to, Heidegger's exposition of the problem of sufficient ground in *Von Wesen des Grundes* (1928) is potentially instructive. We are all familiar with the problem of ground through the formula – elaborated on in Modernity by Leibniz – *nihil est sine ratione*. The formula translates as 'nothing is without a reason' or, positively stated, 'every being has a reason.' What is inconceivable, therefore, according to this formula, is that there would be something without a ground, without a reason. That a groundless being is simply inconceivable has everything to do with the motif of truth that inspires the *nihil est sine ratione*.

So, to arrive at the *problem* of ground, Heidegger offers a brief history of the conception of truth. The tradition of western metaphysics has located truth in proposition or judgment. More precisely, truth is the relation between a proposition and the thing of which the truth is stated in that proposition. For example, if the European Community declares the unity of Member States that have gathered around a market so as to enhance industrial production, this statement is true if economic and industrial activities are essential to the commonness of 'We, Europeans.' The relation between 'Europe' as the subject, and 'common market' or 'economic activity' as predicates, is a relation of identity which corresponds with a state of affairs. That is, a true statement identifies the object as well as its properties, and corresponds, moreover, to the nature thereof: *adequatio intellectus et rei*, truth is the correspondence between proposition and the ontic being.[33] So, in Leibniz we read that '[a] predicate … is always present in a subject …; and in this fact consists the universal nature of truth, or the connection between the terms of the assertion, as Aristotle has also observed.'[34]

As always, what interests Heidegger is this relation which is qualified as a relation of identity: 'The essence of truth, however, is to be found in the *connexio* of subject and predicate. Leibniz thus conceives of truth from the outset … as truth of assertion (proposition). He determines the *nexus* as the "*inesse"* of P in S, and the *"inesse*" as "*idem esse*".'[35] Now, the problem of ground arises precisely because of this relation of correspondence and identity. For, 'true assertions', Heidegger argues, 'assume a relation to something *on whose grounds* they are able to be in

[33] Cf., BT, p. 257.
[34] Leibniz as quoted in PM, p. 101.
[35] Ibid., p. 102.

accord.'[36] Every being, then, has a reason. The reason for the European Union is the common market, as progressive industrial production and economic activity are essential to the commonness of the European peoples. A groundless being that has no definite reason is simply inconceivable, as it contradicts the nature of truth and resists being resolved in identity. Something that cannot be identified without remainder, and not be grasped exhaustively in a true proposition, would be antithetical to the nature of truth. Put differently, a groundless being would be a being of which something cannot be said, which eludes the proposition that tries to state the truth of it.

After kindly leading his audience into these complex matters, Heidegger, as always, points out something so simple, something that speaks for itself and is so self-evident, that we wouldn't even consider it worth questioning. Truth that relates to beings of which the truth is stated does not reveal these beings in the first place.[37] Before we all get busy with saying true things about real states of affairs on whose grounds these true things can be said, these states of affairs and the beings involved in them are already there, are already discovered and revealed, played out in an openness that does not come about through determination, identification and representation. Truth as *adequatio*, therefore, cannot be original truth. Instead, it must be derivative of a more original truth for which Heidegger coins the notion of *aletheia*, unconcealment or disclosedness. *Aletheia* is not at our disposal, cannot be captured by *logos*, but is, so to speak the work of Being. Being is what 'makes' beings present, delivers them into an openness in which they are manifested as being on their own account.

Now, what makes up this primordial disclosedness is not, as said, some activity on the part of the human subject, but rather, the basic condition of our *being-in-the-world*. Indeed, what achieves the move from knowing subject to Dasein is this basic tenet of being-in-the-world. Dasein expresses, precisely, that human being is not an entity that is enclosed upon itself, and that subsequently has to leave itself in order to engage with or gain knowledge about an exterior world. On the contrary, Dasein is always already in the world,[38] not only in the sense that it is embedded and embodied, but first and foremost, that the world makes sense to it. Put differently, the very notion of Dasein expresses that human being does not *have* a relation to the world, but rather *is* this relation. This explains why it is so difficult, if not impossible, to translate Dasein in English. The *Da* cannot be fixed in a 'here' positioned over against a 'there.' Nor is it sufficient to say that Dasein is outside of itself, or understands its here from the there of the world.[39] The very notion of

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[36] Ibid., p. 102.

[37] Compare Ibid., pp. 102, 103: 'However, can anything more originary be brought to bear beyond the delimitation of the essence of truth as characteristic of the assertion? Nothing less than the insight that this determination of the essence of truth … is indeed an uncircumventable one, yet nevertheless derivative. The overarching accordance of the *nexus with* beings, and their consequent accord, does not *as such* primarily make beings accessible.'

[38] Compare BT, p. 84: 'It is not the case that man 'is' and then has, by way of an extra, a relationship-of-being towards the world – a world with which he provides himself occasionally. Dasein is never 'proximally' a being which is, so to speak, free from being-in, but which sometimes has the inclination to take up a relationship towards the world. Taking up relationships towards the world is possible only *because* Dasein, as being-in-the-world, is at it is.'

[39] Compare BT, p. 156: ' In the 'here', the Dasein which is absorbed in its world speaks not towards itself but away from itself towards the 'yonder' of something circumspectively ready-to-hand; yet it is still *itself* in view of its existential spatiality.'

Dasein plays on a spatiality in which a here and a there first become possible[40]: 'When Dasein directs itself towards something and grasps it, it does not somehow first get out of an inner sphere in which it has been proximally encapsulated, but its primary Being is such that it is always 'outside' [*draußen*] alongside entities which it encounters and which belong to a world already discovered … but even in this 'Being-outside' alongside the object, Dasein is still 'inside', if we understand this in the correct sense; that is to say, it is itself 'inside' as a being-in-the-world which knows.'[41]

So, for Dasein to know its way around in the world, it does not have to bridge a gap between itself and its world, as does the knowing subject with the world 'out there.' This is why Dasein, constituted as being-in-the-world, has its being in being-open. Human being ex-ists, stands out in an openness of a world which makes sense. The world is the inter-esse in which we relate to things and persons, prior to fixing the terms of our relations in a subject and object.[42] As Dasein ex-ists, it already knows its way around, knows how to comport itself. In a way, Dasein is like the child who takes up a toy and starts playing with it. And, even if the child takes up an empty bottle or the remote control, which are not toys, and starts playing with it, this does not prove the child to be wrong, nor does it prove the necessity of knowledge about the use of objects. It simply shows that the child comports itself towards things; it shows an understanding that precedes theoretical reflection or explicit knowledge. In a similar vein, a polity is open to the world in that it tunes into an environment. In establishing and ordering itself, it takes its surroundings for granted in the concise sense of the word: Considering itself as a grantee rather than a grantor, it opens itself up to this gift from the world.

Indeed, this knowing and comporting before reflection or knowledge constitutes Dasein as understanding [*Verstehen*]. Understanding makes up what in *Being and Time* appears as Dasein disclosedness, its not-being closed off, its not-being enclosed upon itself: '*Dasein is its disclosedness.*'[43] We always already understand the world, understand, that is, the whole of things. 'In the end', Heidegger argues, 'an essential distinction prevails between comprehending the whole of beings in themselves and finding oneself [*Sichbefinden*] in the midst of beings as a whole. The former is impossible, in principle. The latter happens all the time in our Dasein.'[44] We are always already related to things, know what to do with them, how to take care of them, and deal with them 'in a unity of the whole'[45]: 'Human Dasein – being that finds itself *in the midst of beings*, comporting itself *towards* beings – in so doing exists in such a way that beings are always manifest as a whole.'[46] As will be

[40] Compare SZ, p. 132: ' 'Hier' und 'Dort' sind nur möglich in einem 'Da', das heißt wenn ein Seiendes ist, das als Sein des 'Da' Räumlichkeit erschlossen hat.'
[41] BT, p. 89.
[42] Compare Heidegger, M. *Wegmarken. Gesamtausgabe Bd. 9,* Frankfurt am Main: Vittorio Klostermann 1976, p.350: ' Der Mensch ist nie zunächst diesseits der Welt Mensch als ein 'Subjekt', sei dies als 'Ich' oder als 'Wir' gemeint. Er ist auch nicht erst nur Subjekt, das sich zwar immer zugleich auf Objekte bezieht, so daß sein Wesen in der Subjekt-Objekt-Beziehung läge. Vielmehr ist der Mensch zuvor in seinem Wesen ek-sistent in die Offenheit des Seins, welches Offene erst das 'Zwischen' lichtet, innerhalb dessen eine 'Beziehung' vom Subjekt zum Objekt sein kann.'
[43] BT, p.171.
[44] PM., p. 87.
[45] Ibid., p. 87.
[46] Ibid., p. 121.

discussed in full detail later, Dasein understanding relates both to its world (it knows its way around and is at home in the world where it comports itself with the greatest ease, in a straightforward manner) and to itself as being-in-the-world. Being 'inside out' and, at the same time 'outside in', Dasein can never decide on what is outside, what belongs to the world and what properly belongs to itself. Precisely because there is no such thing as a clear- cut difference between inside and outside, Dasein is never in full possession of itself. And for this very reason, its *own* being is an issue for it. Put differently, Dasein is *concerned* for its own being. Constituted as being-in-the-world, the question that constitutes Dasein is what it means to be a self.

So, again, we would fail human existence if we tried to grasp it in terms of a subject that is enclosed upon itself and subsequently has to find a way out of itself to reach the exterior world. As said already, human existence always already has its way around, ek-sists, that is stands out of itself onto an openness. Metaphysical thinking would not, of course, say that human beings are the same kind of beings as, let's say, tables. But the point of the matter is that metaphysics tries to attain the identity of beings that leaves no trace of what is other to beings, treating all beings alike in an objectified sense, thereby closing off and shutting down the openness that Dasein is. But, Dasein knows better, so to speak. Not only are beings, as a whole, manifest and accessible to it, but also, Dasein already has (or rather *is*) its way of comporting itself towards different beings, of taking care of beings which differ in their Being. Dasein understands, beforehand, that a table differs in its being – which is being-readiness-to-hand ('Die Seinsart dieses Seienden ist die Zuhandenheit')[47] from those beings that are like Dasein, itself, and which have their being in *MitDasein*.[48] For Heidegger, man is the guardian of Being through whom Being makes sense. Dasein comports itself differently towards beings that differ in their Being, and takes care, that is, for the Being of Beings. This is why the Being of Dasein, itself, is defined as *care* [*Sorge*].[49] The first question to be asked with respect to Dasein is, therefore, not *what* it is but, rather, *how* it is.[50] Indeed, this is what the very notion of Dasein as being-in-the-world purports to express: 'Accordingly, world means: beings as a whole, namely, as the decisive "how" in accordance with which human Dasein assumes a stance and maintains itself in relation to beings.'[51] It is, thus, with human existence as Dasein, that the question of Being can arise. Hence, we find Heidegger's dazzling description of Dasein as

[47] SZ, p. 71/BT p. 101.
[48] Cf., SZ, p. 118.
[49] Dasein's *way of being* towards beings that are not Dasein, itself, are defined as *Besorgen* and *Fürsorge*. Compare BT, p. 157: 'Concern [*Besorgen*] is a character-of Being which Being-with cannot have as its own, even though Being-with, like concern is a *Being towards* beings encountered within the world. But those beings towards which Dasein as being-with comports itself do not have the kind of Being which belongs to equipment ready-to-hand; they are themselves Dasein. These beings are not objects of concern, but rather of *solicitude* [*Fürsorge*].' (translation slightly altered) As the translators note, however, '[t]he etymological connection between 'Sorge' ('care'), 'Fürsorge' ('solicitude'), and 'Besorgen' (concern') is entirely lost in our translation.'
[50] Compare BT, p. 67: 'Accordingly, those characteristics which can be exhibited in this entity are not 'properties' present-at-hand of some entity which 'looks' so and so, and is itself present-at-hand; they are in each case possible ways for it to be, and no more than that. All the Being-as-it-is [*So-sein*] which this entity possesses is primarily Being. So when we designate this entity with the term 'Dasein', we are expressing not its 'what' (as if it were a table, house or tree) but its Being.'
[51] PM, p.114.

the being who in its being takes care of Being, that is, as the being for whom Being is at issue.

Paradoxically, however, we tend to forget Being, are oblivious of Being, Heidegger says, notwithstanding this pre-understanding of beings in their Being. Does this mean that we should drop everything, free ourselves from our entanglement with things, retreat and start contemplating Being? On the contrary. The forgetting of Being and the lack of awareness of our own pre-understanding has an important role to play. It is what keeps us going, what guarantees that business is business as usual, without which we would be lost. Retreating from what catches us and with which we are caught in order to contemplate Being, pure and simple, is precisely what humans, as being-in-the-world, can never do. We pass over Being in order to concern ourselves with beings, in order to get and keep going. Fortunately, we are not the only ones to blame for this oblivion; Being, itself, has its part in it as well. Oblivion belongs to Being.[52] As said before, Being renders beings present, is what gives place to beings. But in order to 'do' so, Being has to withdraw itself from whatever it is that is rendered present in order for it to be, exactly, present. If Being 'makes up' unconcealment and openness, it itself withdraws in concealment and darkness for that which is, thus, unconcealed to truly blossom. The unconcealment of Being, *a*letheia, can never leave its *lethe* behind. In his *Truth and Singularity,* Visker very well captures what truth as *aletheia* amounts to: '[I]n a certain sense, one cannot but forget Being. And, this oblivion is not a human affair, something which one can do or not do. Man can only see and act on the basis of a blind spot; he can only deal with beings by not dealing with Being, as such … being is, therefore, nothing more than the forgetting of being itself. It is because Being merely "is", "works", "occurs", by keeping itself in the background because it can merely let beings be by retreating, that it is itself forgotten.'[53]

What this implies is, first, that Being is never exhausted by *logos*, can never be made intelligible. Second, the question of Being that moves Heidegger's thinking is not answered by a remembering of Being. Instead, the question asks that we become attentive to the oblivion of Being,[54] that we do not forget the forgetting of Being.[55] As oblivion belongs to being, we can never decide on the truth of being,

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[52] On the oblivion of Being see Heidegger, M. *Identität und Differenz*, Pfullingen: Neske 1957.

[53] R. Visker, *Truth and Singularity. Taking Foucault into Phenomenology*, Dordrecht/Boston/London: Kluwer Academic Publishers 1999, pp. 67, 68.

[54] Cf., Heidegger 1957.

[55] According to Van der Walt, this constitutes the potential redeeming qualities of Heidegger's thinking for thinking about law. As oblivion belongs to Being, we can never directly approach being. At best, we can adopt a sidelong glance, a parallax view perhaps, approaching Being indirectly and through beings. According to Van der Walt, this sheds light on the relation between plurality and unity, politics and law. The *Being* of law refers to the manifold or the plurality that occasions the law, whereas law refers to the ontic determination and identification necessary for the unity made out of plurality which is required by law. Law, that is, cannot but resort to the ontic determination of the case, identifying and deciding it by destroying or forgetting the plurality that preceded and occasioned it. It cannot but, Van der Walt argues, exclude and forget plurality. It is only because of this irreducible forgetting, he explains, that law becomes possible. But, what can it possible mean for law not to forget this forgetting. According to Van der Walt, the Heideggerian thought at issue is: 'Being hosts an irreducible plurality of possible manifestations and forms of human existence, all of which must be reduced to one such expression or manifestation (one correct understanding) whenever the law is called upon to resolve intractable moral and socio-political conflicts. This sacrificial reduction of the irreducible ontological plurality of Being to the ontic univocity of legal meaning … is incircumventible. But, this incircumventible forgetting need not be forgotten … Legal interpretation can meaningfully and

we can never directly approach Being. With Being as *aletheia*, unconcealment, the rendering present of things builds on a prior closure, a prior concealment. We never stand in the full light of an origin, but instead, ultimately face opacity. What human beings can never do is leave the everyday order of familiarity in order to appropriate an origin. In the existential analytic of Dasein this comes under the notion of facticity. Facticity, I believe, is the key notion from which the whole exposition of Dasein develops.

4.3.1 Facticity. Or, the First Decision

To introduce the difficult notion of facticity, I briefly return to the intersection between law and politics. Recall from the previous Chapter that the lawyers involved in the Guantanamo trial could do their ingenious work because the people demanded that the law be applied in a just way, claiming that their constitutional rights equally held for the refugees. By claiming rights the government denied to the refugees, they anticipated a possible meaning of the law that remained highly uncertain until the District Court ruled in favor of the refugees. Indeed, both Honig and Spijkerboer make a case for law's capacity to bring a new world into being, with different rights and different right-bearing subjects, by showing that law is always intermingled with politics. To proceed from law, then, does not get us stuck in an endless repetition of the same, but opens us to a world of change by taking law in an unforeseen direction.

From a Heideggerian point of view, taking law into a new direction constitutes the finitude of freedom. That one always has to link up with the already established meaning of the law implies, Heidegger would say, that certain possibilities are already *withdrawn*. Freedom, recall, is always limited. Yet, freedom is not ruled out by this limitation, but emerges because of the irreducible decision involved in every application of the law. Because of this irreducible decision, the application of the law is always *richer* than its established meaning. It is, Heidegger would say, what exceeds.[56] This double movement of withdrawal and excess captures Honig's paradox of politics, as it shows that linking up with law also always entails transgressing it. Note that what is at issue here is more radical than the malleability of legal rules which, for example, Duncan Kennedy defends.[57] The point is, rather, that one can only *apply* the law by *exceeding* the law.[58]

There is a fundamental ontological implication to be drawn here from which a more radical sense of finitude arises. The double movement of withdrawal and excess, of application and transgression, highlights that one can never leave the everyday order of law, even if one seeks to bring a new world into being. The

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significantly be required to remember the inevitable forgetfulness of legal hermeneutics, and the destruction of plurality that it wreaks. Thus, can legal interpretation at least maintain an indirect regard for the plurality it is always bound to destroy … Thus, can it keep in play, *alongside* the law, that which law must *set aside*; thus, can it *keep in play alongside* the vociferous and sonorous legal meanings that it has to coin so as to decide a case, the elegiac murmur of the infinite possibilities of legal meanings it ruins and *sets aside*.' (Walt, van der J. 'The Murmer of Being and the Chatter of Law', *Social and Legal Studies*, forthcoming 2011).

[56] Cf., PM, pp. 128, 129.

[57] **C**f., Kennedy, D. 'A Semiotics of Critics', *Cardozo Law Review*, vol. 22 (2000), p. 1168.

[58] Cf. Corrias, L. *The Passivity of Law: Competence and Constitution in the European Body Politic,* PhD diss., Tilburg University 2010, p. 90.

principle of ordering, Heidegger therefore says, is presupposed in the very act of ordering and cannot be found outside of it.[59] Or, as Waldenfels argues, we always already move 'within the framework of an order behind which we cannot regress except at the cost of unconsciousness or incomprehensibility.'[60] Indeed, recall from the first chapter that a refugee's asylum account is only deemed credible if he presents the facts that constitute the reasons for his flight within the symbolic context of the receiving polity. Without playing the rules of the hosting polity, the facts simply won't reveal themselves, and the claimant will be incomprehensible as a refugee.

Facticity has to do with this 'always already.' That we always already move within order implies that our existence as a people has always already begun. To be sure, that the beginning has always already been made and order thus begun, does not contradict the thesis, stated at the beginning of this chapter, that order is not ready- made, but brought about. That order is brought about by means of inclusion and exclusion – that the people claims as its right in order to determine itself and be free – does not mean that the beginning of order, the very first decision, so to speak, is at our disposal or discretion. The beginning of order cannot be ascribed to a Highest being (god) nor to ourselves (unless in retrospect) but, rather, stems from what Waldenfels calls a *primary production.*[61] At the origin of order lies a decision that isn't ours and that can never be fully appropriated by us. The first decision reminds us that we have never been present at the origins of our existence as a people. The fundamental lack of ground that appeared in the previous chapter, now opens itself as the abyss in which we experience our own absence. The abyssal experience of our own absence happens whenever we are confronted with something new and unexpected that cannot be incorporated immediately, does not register directly, but that can neither be ignored nor pushed back. As Waldenfels argues: 'Astonishment, awe, fear, alarm, horror – all these affects with which we respond to such events – point to the fact that where something novel is making a breakthrough, we do not have the first word or initiative.'[62]

The originary decision is beyond our reach, withdraws from our grasp, retreats in darkness and silences us. That a we can never say 'We', but can only be spoken for is, therefore, not merely a linguistic phenomenon, but reminds that we do not have the first word. And, every time the We is spoken for and represented, its own absence is affirmed and emerges from this very act of speaking and representing. This peculiar absence that hovers over our birth, thus, takes hold on our further existence as a people, rendering existence fragile. This fragility makes us 'pause and be humbled'[63] and makes us concerned for our own existence. Arising from a decision that isn't ours, nor can be ascribed to a highest being, means that we are *delivered over to ourselves* without an origin to fall back on. Groundlessly being delivered over to itself is precisely what Heidegger coins as the facticity of Dasein.

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[59] Cf., BT, p. 77.
[60] Waldenfels 1996, p. 3.
[61] Cf. Ibid., p. 101.
[62] Ibid., p. 101.
[63] Honig 2009, p. 79.

4.3.2 The Facticity of the We

As the first act of ordering cannot be ascribed to an Orderer, nor to ourselves, we as a people are abandoned in the twofold sense of the word: We are forsaken and entrusted or delivered over to ourselves.

Taking my cue from Nancy, it could be said that the We is 'abandoned *at birth*', in its beginning, and hence, 'doomed infinitely to be born.' 'To be born', Nancy says, 'means precisely never to cease being born.'[64] The We never ceases being born because its abandonment leaves it without a definite rule and measure to determine itself. And because of that, the We never coincides with the way in which it determines itself, so never manages to fully realize itself. The We always falls apart and can never remit in full its own lack, its own absence.

But does this not imply that the We's existence is infinite rather than finite? That, in other words, infinity is the truth of the We and finitude only the necessary limitation of its freedom? Certainly it does not. For, the We's own absence not only refers to the origin, to the beginning of the We. It also relates to its own *end*. Indeed, death is the proper name of its own absence (this point will be taken up and developed below). Absence holds the beginning and end of the We together. The We never ceases being born because it feels death pulling at its shoulders. Beginning and end, death and birth are this close. As Nancy argues in *The Sense of the World*: 'One has to do here with a death that has always already taken place in existence, as existence itself: death as birth … henceforth, *not* as birth to a beyond-the-world, but simply to this world *here*.'[65] From its very inception, the We endures its own absence, stands out to the possibility of not-being. As this chapter argues, this is, in short, what it means to exist finite. 'Finitude', Nancy says, 'is the truth of which the infinite is the sense.'[66] As will become clear, finitude is precisely what enables us to exist as a self, to become a self. And there is no end to this becoming: 'The coming is infinite: it does not get finished with coming; it is finite.'[67]

What Nancy calls abandonment appears in *Being and Time* as facticity. On a Heideggerian reading of the term, facticity expresses, precisely, that the We is neither an *ens creatum* nor *causa sui*.[68] The We did not bring itself into existence, but is, instead, delivered over to itself, groundlessly, as it is not preceded by a Highest being. Groundlessly, as its whence and whither remain in darkness.[69] Delivered over to itself, the We does not stand in the full light of an origin. So, before the We decides anything, cuts through a knot of already present possibilities, it is passable to what Nancy calls the decision of existence that it cannot make its own.[70] The

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[64] Nancy, *The Birth to Presence* (translated from French, W. Hamacher & D. E. Wellbery eds.), Stanford: Stanford University Press 1993, p. 40.
[65] Nancy, J.L. *The Sense of the World* (translated from the French), Minneapolis [etc]: University of Minnesota Press 1997, p. 32.
[66] Ibid., p. 29.
[67] Ibid., p. 35.
[68] Cf. Heidegger, *Ontology. The Hermeneutics of Facticity* (translated from German), Bloomington/Indianapolis: Indiana University Press 1999, p. 17. Hereafter referred to as OHF.
[69] Cf., BT, p. 173.
[70] Cf., Nancy, *The Birth to Presence* (translated from French, W. Hamacher & D. E. Wellbery eds.), Stanford: Stanford University Press 1993, p. 87.

decision of existence 'possiblizes' the We',[71] offering it to existence 'by reason of which it is unappropriable.'[72]

It is important to gain full understanding of what facticity means and entails, as it is on account of facticity that the self appears on stage.

As facticity expresses that the We is forsaken and left to itself, it constitutes the basic tenet of being-in-the-world. In short, facticity expresses that the We is delivered over to the world. The We, as Heidegger would say, is *thrown* into the world. 'The expression thrownness is meant to suggest the *facticity of its being delivered over*.'[73] Recall from the previous section that being-in-the-world expresses that we do not have, but rather, are a relation to the world. We always already know our way around, know how to comport ourselves and understand the world prior to any explicit appropriation and interpretation on the basis of knowledge. We are, that is, adapted. We are always already inscribed in a meaningful network of relations, and find ourselves amidst a meaningful whole. The world, therefore, is not the globe. Rather, we are thrown into a certain place, a certain time. Delivered over to the world, always thrown somewhere, we are, that is, situated. The basic tenet of being-in-the-world casts the world as the *in-between* or the *inter-esse* that directs our interests, prior to any clear- cut division between those who share in this interest and those who don't.[74] That our world is the inter-esse that directs our interests means that we have to reckon with certain stable givens and a relatively determined state of affairs. What we can exploit depends upon what lies beneath, and if our soil does not contain oil we will establish a coal and steel industry that determines our economy. Our surroundings direct our activities, our customs, our habits, our way of living. If the land is flat, we lay cycling tracks with the effect that biking is not only good for leisure and sports, but also is a good means of transport. And, as even members of parliament go to work biking, we design our bikes in such a way that we have to sit up straight, which is certainly more dignified than hanging bowed over our mountain-bikes which we use on the weekends to sweat and work out.

Facticity is shorthand for the 'always already', referring, that is, to the facts that are given to us: 'Whenever Dasein is, it is as a fact; and the factuality [*Tatsächlichkeit*] of such a fact is what we shall call Dasein's facticity.'[75] Facticity, as Visker explains with respect to singular Dasein, amounts to 'the inevitable facts that characterize each of us as the one s/he is.'[76] Facticity, thus, denotes the specific sort of factuality or concreteness of Dasein that differs from the brute factuality of things: 'Facticity is, in fact, simply Heidegger's technical term to distinguish what one could call 'concrete Dasein' from the kind of concreteness one meets in other beings. 'Factical' Dasein is, of course, a situated Dasein in many ways: It is born in a certain place, at a certain time, in such or such a family, it is a boy or a girl with certain physiognomy (colour of skin, of eyes, of hair, …) growing up in a town or

[71] Cf., Ibid., p. 85.
[72] Ibid., p. 86.
[73] BT, p. 174/ SZ p. 135.
[74] Compare Ibid., p. 119: 'That wherein Dasein already understands itself in this way is always something with which it is primordially familiar. This familiarity with the world does not necessarily require that the relations which are constitutive for the world as world should be theoretically transparent.'
[75] BT, p. 82.
[76] Visker 2004, p. 16.

on the countryside, speaking the local dialect or not, etc. … One could say that whenever Heidegger writes 'faktisch' (factical) he was simply, by abbreviation, referring to all the above. But, the point is that there is a difference, characteristic for Dasein, between what is 'faktisch' and what belongs to mere factuality (*Tatsächlichkeit*). Whatever 'facts' one can enlist for this person's Dasein, will be 'facts' that are taken up in his or her Dasein: not predicates, but adverbs, modalities of his/her being.'[77] It is a fact that I am white, just as it is a fact that the wall in front of me is white. But my whiteness differs from the whiteness in things, precisely insofar as it is *my* whiteness which is not indifferent to me, even though, as Visker stresses, I am not sure how my skin color belongs to me and me to it.[78]

But if 'our facts' differ from the brute facts of things, then there is more to facticity than mere situatedness. Facticity, though related to the 'facts' of Dasein, by no means suggests that Dasein is fixed in its properties. Otherwise still, facticity refers to more than the factuality of Dasein as it each time is.[79] The 'always already' does not express, Agamben argues, 'the immobility of a factual situation', but instead, unravels the 'e-motion [*Bewegtheit*] proper to life.'[80] The movement proper to life is guaranteed by the *throw* in which Dasein remains as long as it exists [*Dasein,* solange *es ist, im Wurf bleibt*[81]]. Dasein is not only delivered over to the world, but *projects itself* [*Entwurf*] into its world. And it is projection that explains why the 'facts' of Dasein differ from the facts of things. Or more precisely still, it explains why Dasein is not delivered over to facts, but to possibilities. Facticity is, therefore, not exhausted by thrownness, but constitutes Dasein's very existence, as well.[82]

What makes Dasein's factuality pass over into potentiality, assuring that Dasein remain in the movement of the throw, is Dasein's understanding. Dasein, recall, is not enclosed upon itself, but is essentially openness. Having its being in being-open, Dasein, as said, is constituted as understanding. The passage in *Being and Time* that introduces facticity as the specific sort of factuality in Dasein continues to read that facticity also expresses that Dasein, beforehand, understands its world by taking up a place in its world and understands itself, again beforehand, from the

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[77] Ibid., pp. 222-223.

[78] According to Visker, facticity betrays a 'certain ontologism' that suggests that all our facts 'can be taken up in existence.' (Ibid., p. 16). Over against Heidegger's transitive facticity, Visker, therefore, unravels an 'intransitive facticity' that highlights that the facts that belong to us can, nevertheless, not be taken up in our existence and therefore, give a sense of what is our own we are unaware of (Cf. Ibid., p. 17).

[79] Ricoeur also understands facticity solely in relation to 'factuality', 'concreteness' and 'situatedness', as it denotes, according to him 'in a global manner what in which we actually exist'. Even more so, facticity places 'the main emphasis on the always already.' Cf., Ricoeur 1994 pp. 314-315.

[80] Agamben 1999, p.190.

[81] SZ, p. 179.

[82] Compare BT, p. 185: '[D]asein is constantly 'more' than it factually is, supposing that one might want to make an inventory of it as something-at-hand and list the contents of its Being, and supposing that one were able to do so. But Dasein is never more than it factically is, for, to its facticity its potentiality-for-Being essentially belongs. Yet, as Being-possible, moreover, Dasein is never anything less; that is to say, it *is* existentially that which, in its potentiality-for-Being, it is not yet.' Nonetheless, facticity is usually understood to relate to thrownness and improper understanding. Critchley, for example, also stresses the centrality of facticity in the existential analytic of Dasein, linking it to Dasein's thrownness and the improper, while distinguishing it from existence, projection and the proper: 'I seek to read Heidegger's analysis … against the grain in order to bring into view much more resilient notions of facticity and thrownness that place in doubt the move to existentiality, projection, and authenticity.' (Critchley 2008, pp. 132, 133).

'there' of its world.[83] What is absolutely decisive in Hedeigger's exposition of Dasein is that its understanding is related to possibilities, constituting Dasein as potentiality-for-being [*Seinkönnen*],[84] not in the sense, however, that Dasein is opened onto an infinite range of possibilities out of which it can select a few as it pleases. For, this would contradict the very nature of Dasein as being *thrown* into the world.[85] Dasein, Heidegger says, 'is *thrown possibility* through and through'.[86] Dasein, that is, is thrown into certain possibilities (we have the wind not the oil) implying that from its very inception, other possibilities are withdrawn from it: '[I]n having a potentiality-for-being, it always stands in one possibility or another: it constantly is *not* other possibilities, and it has waived these in its existentiell projection.'[87]

Certain possibilities are always already withdrawn from us. The fact that anthropological distinctions between Europeans and non-Europeans do matter, prior to any valuation of these distinctions, bespeaks that we are thrown possibility, through and through. These differences are experienced, for example, if we travel outside Europe, and meet people for whom the Holocaust simply is not an historical fact, or to whom a different genocide matters. And even though the Holocaust matters to us in a wholly different way than the Armenian genocide matters to us, we can never explain in full why it matters, how it relates to us and we to it. Or, to give another example, we are always delivered over to a cultural heritage drenched with religion. And even if we no longer believe in a god, we still relate to the tradition of religion, for example, when we try to make sense of the human need for reverence or when we bury our loved ones.[88] What interests Heidegger, as always, is this relation. We always relate to possibilities into which we are thrown (which, evidently, does not imply or justify that we remain ignorant of, or indifferent to the slaughter in Anatolia). And, because of this having to relate, because of this relation, Dasein, as Critchley puts it, is 'the name of a recoiling movement that unfolds only to unfold back on itself.'[89]

Reflexivity amounts to this recoiling movement. The We 'departs' from itself, traverses, so to speak, the properties that belong to it in order to 'return' to itself.[90] And this explains why Heidegger casts Dasein's understanding as potentiality-for-being. Understanding is to be understood as a projection [*Entwurf*]. Consider again that Dasein does not create or invent itself *ex nihilo,* but is instead delivered over to certain givens with which it has to reckon. To stick with the example of 'being European', I have to picture myself in the category 'European' as the subject of that property. I have to *project myself* into the rather impersonal adjective 'European',

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[83] Compare BT, p. 82 (translation slightly altered): 'The concept of 'facticity' implies that a being 'within-the-world' has being-in-the-world in such a way that it can understand itself as bound up in its destiny with the Being of those beings which it encounters within its own world.'

[84] Cf. BT, pp. 183, 184/ SZ, pp. 143, 144.

[85] Compare Ibid., p. 183: 'Possibility, as an *existentiale*, does not signify a free-floating potentiality-for-being in the sense of 'liberty of indifference' (*libertas indifferentiae*).'

[86] BT, p. 183.

[87] BT, p. 331.

[88] On our relation to tradition see Agamben 1999, p. 105: 'What must be transmitted is not a *thing*, however eminent it may be; nor is it a truth that could be formulated in propositions or articles of faith. It is, instead, the very unconcealment (*a-letheia*), the very opening in which something like a tradition is possible.'

[89] Critchley 2008, p. 133.

[90] Cf. Agamben 1999, p. 118.

I *mirror myself* into the image of a European. I read, for example, Euripides' *Heracles Children*, as part of the cultural tradition of Europe, arguing that We, with respect to the rights of those washed ashore, should model ourselves after the King of Athens, who exclaimed that he would rather hang himself than throw discredit on Athens as a free city by turning down the refugees who asked for his protection.[91]

The European We is not the King of Athens. But the point is that in modeling itself after him, the We understands itself in and through identifying itself with what is not itself. To understand oneself is to anticipate oneself by assuming an image that is not exclusively its own. Identity is a kind of throw off and throw out, a leap forward. Anticipating itself, Dasein, Heidegger says, is ahead of itself. To make one's own what is given – which is what being a self amounts to – is to take a leap forward (a future Europe) that refers back to a past (Athens). Anticipation and being-ahead of oneself belong to the core of being, exactly, a self. As anticipation is constitutive of the self, the self, so to speak, always comes too late, never catches up and never fully coincides with whatever it is with which it identifies. The self is, therefore, not fixed but always remains possible. Projection as being ahead of oneself *enables* us to be.

So, again, Dasein's understanding is not related to possibilities in the sense that Dasein stands before the open land of innumerous possibilities which it can try and experience. Rather, potentiality belongs to understanding because Dasein, in understanding itself out of possibilities into which it is thrown, is always ahead of itself. Being ahead of itself constitutes Dasein as potentiality-for-being.[92] As Heidegger puts it in *Ontology. The Hermeneutics of Facticity,* (1923) Dasein is always on the way: 'Dasein is Dasein only in *itself*. It *is*, though as the *being-on-the-way* of itself to *itself*! … What is revealed in it is how the *anticipatory leap forward and running in advance* should be undertaken and can only be undertaken. The anticipatory leap forward: not positing an end, but reckoning with being-on-the-way, giving *it* free play, disclosing it, holding fast to *being-possible*.'[93]

Understanding as projecting oneself into what is not 'self', thereby anticipating this very self, explains why Dasein is not simply delivered over to facts but, indeed, to possibilities. Facticity, thus, comes into view as groundlessly being delivered over to possibilities (thrownness) out of which Dasein understands itself (projection). Constituting what in *Being and Time* appears as being-thrown and projection was precisely what facticity purported to express in *Ontology. The Hermeneutics of Facticity*: 'Facticity is the designation we will use for the character of the being of 'our' 'own' *Dasein* … As that which is in each case our own, Dasein does not mean an isolating relativization into individuals which are only seen from the outside and thus the individual (*solus ipse*). "Our own" is rather a how of being [*sondern* Eigenheit *ist ein Wie des Seins*], and indication to a possible path of being-wakeful [*Wachseins*] …

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[91] For an overview of the practices of protection and asylum in antiquity see Grasmück, E.L. *Exilium: Untersuchungen zur Verbannung in der Antike*, Paderborn (etc.): Schöningh 1978.

[92] Compare BT, p. 185: 'And as thrown, Dasein is thrown into the kind of being we call "projecting." Projection has nothing to do with comporting oneself towards a plan that has been thought out, and in accordance with which, Dasein arranges its Being. On the contrary, any Dasein has, as Dasein, projected itself; and as long as it is, it is projecting. As long as it is, Dasein has always understood itself and always will understand itself in terms of possibilities … [P]rojection, in throwing, throws before itself the possibility as possibility, and lets it *be* as such. As projecting, understanding is the kind of Being of Dasein in which it *is* its possibilities as possibilities.'

[93] OHF, p. 13.

Accordingly, factical means something which is of itself articulated with respect to, on the basis of, and with a view to such a *factical* character of being, and "is" in this manner [faktisch *heißt sonach etwas, was auf* so *seienden Seinscharakter von ihm selbst her artikuliert ist und dergestalt ist*].'[94]

So, by virtue of facticity we articulate ourselves, understand our self out of that into which we are thrown. Facticity, therefore, constitutes the two most fundamental possibilities of Dasein, to wit, its proper and improper understanding which will be discussed below.

4.4 The Famous Line in *Being and Time*

I thus take facticity to denote that the We is groundlessly delivered over to possibilities out of which it understands itself. The We and its world are always intertwined. The We's self-understanding, therefore, always takes place in an interesse which is precisely *not* itself. Put differently: as understanding the We is both related to its world and to itself as being-in-the-world. It understands its world by taking up a place in its world, by projecting itself into its world, and in doing so it understands itself. It understands itself from the 'there' of its world, relying upon, and mirroring itself in a world that already makes sense[95]. The We, thus, understands itself both from within and without.

Eigentlichkeit and *Uneigentlichkeit*, which are the two fundamental possibilities of Dasein's understanding, respectively refer to this. Taken in a 'strict terminological sense',[96] *Eigentlichkeit*, or proper understanding, signifies Dasein's understanding from within. It denotes the way Dasein understands itself on its own accord. Or more precise still, taking into account that Dasein signifies being-in-the-world: It signifies Dasein's understanding of its self *out of* the possibilities into which it is thrown, *out of* the qualities to which it is exposed. Indeed, recall from the beginning of this chapter that the self does not exist as an entity over against representation and identification. Representation, identification, determination do not cover up what is our own; rather, what is our own arises from these very representations and identifications. *Uneigentlichkeit*, or improper understanding, relates to these identifications and representations.

Heidegger's language is admittedly highly abstract and complex. But what the two modes of understanding purport to express is simply this: Dasein establishes itself on the basis of possibilities into which it is thrown. It receives and derives what it is from its world, determines itself by drawing on what has already been established as meaningful. Thus, when the High-Contracting Parties to the

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[94] Ibid., p. 5/ Heidegger, M. *Ontologie (Hermeneutik der Faktizität)*, Vittorio Klostermann, Frankfurt am Main, 1988, p. 7.

[95] Compare BT, p. 182: 'To say that in existing, Dasein is its 'there', is equivalent to saying that the world is 'there'; its *Being-there* is Being-in. And the latter is likewise 'there', as that for the sake of which Dasein is. In the 'for-the-sake-of-which', existing Being-in-the-world is disclosed as such, and this disclosedness we have called 'understanding.' In the understanding of the 'for-the-sake-of-which', the significance which is grounded therein, is disclosed along with it. The disclosedness of understanding, as the disclosedness of the 'for-the-sake-of-which' and of significance equiprimordially, pertains to the entirety of Being-in-the-world. To say that the 'for-the-sake-of-which' *and* significance are both disclosed in Dasein, means that Dasein is that entity which, as Being-in-the-world, is an issue for itself.'

[96] BT, p. 68.

Maastricht Treaty committed themselves to the 'need to create firm bases for a future Europe' they referred back to a past in which principles of 'liberty, democracy and respect for human rights and fundamental freedoms and the rule of law' already counted as meaningful.[97] The enlisted fundamental values are improper, to the extent that those who claim a future Europe did not themselves invent these values. Yet, that the European We commits itself to what is not strictly or exclusively its own does not imply, of course, that it is indifferent to these values. When the contracting states express in the Treaty that they are determined to 'establish among *themselves* a European Union' they express, precisely, that a future We, a future Europe, tries to make its own an identity it did not invent all by itself and that it undoubtedly shares with other democracies. *Eigentlichkeit*, or the proper, refers to this. Clinging to one of these possible modes of understanding is to fall into pathology. Without the backup of improper identifications and representations, understanding itself from within would be inconceivable. And not to make one's own what is improper would condemn the We to exist as a mere repetition in which it lives by the dictionary definitions of common values, identities and affections, engaging, moreover, in what Critchley calls a 'politics of abstraction' in which the We fails to anchor law in everyday social practices.[98]

The theme of the proper and improper – and hence, the theme of Dasein – thus brings the problematic of selfhood into play.[99] Indeed, what Heidegger coins as the improper and proper, respectively, corresponds to identity as sameness (idem-identity) and identity as selfhood (ipse-identity). And, what makes matters complex is that *ipse* is not the expression of *idem* (to be a self, it is not sufficient to just sum up qualities and identifications), while at the same time there is no such thing as an *ipse* without the support of an idem. Viewed from the question of selfhood, it is clear that the proper and improper cannot be staged as an opposition,[100] as, for example, the authentic and inauthentic can.[101] In fact, the

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[97] After recalling 'the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe', the High Contracting Parties of the Maastricht Treaty confirm 'their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law.'

[98] Cf., Critchley, S. *Infinitely Demanding: Ethics of Commitment, Politics of Resistance*, London [etc.]: Verso 2007, p. 144.

[99] Heidegger's move from subject to Dasein comes down to this. Compare BT., p. 367: 'For the ontological concept of the subject *characterizes not the Selfhood of the "I" qua Self, but the selfsameness and steadiness of something that is always present at hand.* To define the "I" ontologically as subject means to regard it as something always present-at-hand.'

[100] Compare BT, p. 146: 'Understanding can be primarily immersed in the disclosedness of the world, that is, Dasein can understand itself first and foremost out of the world. Or else, understanding projects itself primarily in the 'for-the-sake-of-which', that is, Dasein exists as its self. Understanding is either proper, arising from within one's own self, or improper. The 'im-' does not denote that Dasein cuts itself off from its self and understands only world. World belongs to selfhood [*Selbstsein*] as being-in-the-world … Being immersed in one of the two fundamental possibilities of understanding does not mean that the other is excluded … In understanding of world, the understanding of being-in [i.e., of Dasein, NO] is implicated, while the understanding of existence is also always an understanding of world.'

[101] This is worth stressing, as the mutual dependency between the proper and improper is obfuscated – as is the theme of selfhood – by an understanding and/or translation of *Eigentlichkeit* as authenticity and *Uneigentlichkeit* as inauthenticity. This shade does matter, if only because of the political ramifications of the authentic and inauthentic. For, between the latter a strict opposition *is* possible. More precise still, the authentic and inauthentic derive their meaning from the opposition between them, inspiring a discourse that advocates a retrieval of a lost authenticity from a besmirching inauthenticity. Admittedly, the issue of *Eigentlichkeit* and *Uneigentlichkeit* is possibly disturbing because of the possible infection of these notions with yet another distinction Heidegger only mentions in passing, namely the distinction between *echt* and *unecht*, the

authentic and inauthentic derive their meaning from the very opposition between them and, therefore, inspire a discourse that advocates a retrieval of a lost authenticity and a search for a true identity, a true people. With Dasein, this opposition becomes unattainable, as Dasein always starts, so to speak, from outside, determining itself by identifying itself with what it is not. Indeed, that Dasein understands its self out of the possibilities into which it is thrown already implies that Dasein cannot be fixed on either of the terms of the proper or improper.

To sum up: facticity not only constitutes our inscription in a meaningful world that directs our understanding from without. It also constitutes our proper understanding as it sets the task to make our own what is given. Facticity, therefore, gives rise to what is probably the most famous line of *Being and Time,* to wit, that 'Dasein's essence [*Wesen*] lies in its existence.'[102] This explains, secondly, why Dasein is not indifferent to itself which, thirdly, accounts for the fact that Dasein is reflexively defined as the being for whom its own being is at issue. I will shortly discuss these three variations on the theme of facticity.

Again, facticity does not purport to express that Dasein as and what it is, is each time a fact. Nor does it simply refer to all of what Dasein is. Instead, facticity speaks of Dasein's abandonment, the 'fact' that Dasein is forsaken and left to itself, delivered over to possibilities out of which it understands itself. As Dasein *is* its possibilities, facticity, rather than revealing what Dasein is, reveals that the being of

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genuine, unalloyed and the ingenuine. Both the *eigentlich* and the *uneigentlich*, Heidegger says, can be either genuine or ingenuine (Compare SZ, p. 146: 'Das eigentliche ebensowohl wie das uneigentliche verstehen *können* wiederum echt oder unecht sein.' (proper as well as improper understanding can be either genuine or ingenuine). It is this possible infection, so to speak, that has caused the inadequate yet stubborn translation of authenticity and inauthenticity. Hence, Nancy rightly argues: 'The category of the "authentic" essentially implies the idea of a purity of origin or provenance, of a native excellence, in relation to which one can represent or bring about an "inauthentic" falsification or degradation … German has its own word, which Heidegger uses, for the idea of "authenticity": *echt, Echtheit* … *Eigentlichkeit*, by contrast, speak nothing but "ownness", what belongs to someone or something as the person's or thing's own, what can be said of something in its own right … "Ownness" and "authenticity", no doubt, are not without a certain relation. But, as it happens, thought about the decision of existence proposes, precisely, to make an essential distinction between the two, in spite of this relation.' (Nancy 1993, p. 100).

Importantly, the category of the genuine and ingenuine resurface in the discussion of *das Man*. So, important for the they, after all, is that '[e]verything looks as if it were genuinely understood, genuinely taken hold of, genuinely spoken […]' (BT, p. 217). In fact, I believe that *das Man* is the accumulation of the infection of *Eigentlichkeit* with *Echtheit*. *Das Man* reflects precisely a living together that is concerned for the difference between what is authentic and what is inauthentic and impure. *Das Man*, in other words, is the apex of a living together based on identity and identification on the grounds of having access to the origin which is to guarantee the purity and authenticity of the people. I, therefore, disagree with those attempts that seek to rethink and reevaluate *das Man*, as, for example, both Nancy and Critchley intend, despite the important differences between them. Critchley, thus, argues: 'The critique of authenticity, particularly with regard to social and political life, permits a revalorization of social existence … [I]f we view Heidegger's descriptions from the perspective of originary inauthenticity, then a good deal changes. For example, when Heidegger writes that in the world of "the they" "… everyone is another and no one himself", or indeed, when he says that the "who" of everyday Dasein is *Niemand*, nobody, then such phrases might be otherwise interpreted. If we are, indeed, others to ourselves in social existence, if we are even nobody in particular, then this could well provide the basis for a thinking of sociality that would not be organized in terms of the goals of authenticity, autarky, or communitarian solidarity … The point is that *das Man* need not be seen as an inauthentic or leveled down "publicness" that requires the authenticity of *das Volk*. We might simply abandon the latter and affirm the former.' (Critchley 2008, p. 148). It is difficult to see, however, how in Critchley's suggestions and descriptions the problematic of selfhood, which the very theme of Dasein brings into play, is to be retained.

[102] BT, p. 67.

Dasein can burst forth as a 'naked *that* it is and has to be'.[103] Dasein never simply is, but is placed under the burden of having to be, or, to be more precise, of having to be a self. Since Dasein is only a self in its projections, Dasein's *Wesen* is not a thing or a substance. Rather, its *Wesen* must be understood as a verb, as a rising forth in its projections. In order to be a self, Dasein hurls itself out of itself -- and never stops doing so. Which is why, precisely, its *Wesen* lies within its existence, rather than its existence being the realization of an essence. So, if the claim to a future Europe, as it figures in the Maastricht Treaty, refers back to a past in which values of that future Europe already appear as meaningful, this does not imply that the project of the European Union is the realization of some European essence. On the contrary, the European Union is a *project* precisely insofar as its projects itself in an image of Europe, and anticipates itself by means of an identification with what it is not yet.

So Dasein, always in the movement of the hurl, is always ahead of itself.[104] Dasein has to endure that it is not, nor ever will be, fully present to itself. Projecting itself into what it is not yet means that, as Agamben puts it, man 'to be *himself* [must] necessarily divide himself.'[105] Marked by division and constituted as a fracture, facticity is not some event at the beginning of Dasein which brought Dasein into being. On the contrary, facticity does not lie behind us, but is always *jeweilig*, is always now.[106] Dasein will never clear its lack of presence at its origin, will never be in full possession of itself, and will never attain an identity without remainder. For that very reason, Dasein is not indifferent to itself; is not indifferent, that is, to what is its own. Were Dasein to be in full possession of its self, it wouldn't be really bothered by itself. The self wouldn't really matter, as it wouldn't be at stake. Rather, it is as if Dasein is losing a self it did not possess in the first place. According to Heidegger, what bespeaks of this non-indifference of Dasein to its self, is that Dasein expresses itself as an I. As Francoise Dastur explains the point: 'So in saying I, Dasein expresses its own being, and it is for this that Heidegger reserves the term existence.'[107] To say the same thing differently, what bespeaks of this non-indifference is that Dasein is in each case our own. Thus, in *Being and Time,* we read: 'The Being, which in the being of Dasein is at issue, is *mine*. Thus, Dasein is never to be taken ontologically as an instance or a specific case of some genus of beings that are present-at-hand. Such beings are indifferent to their being, or, strictly speaking, their being is such that they can neither be indifferent nor not-indifferent. Because Dasein is in each case mine, my own [*Jemeinigkeit*] the personal pronoun must be said every time Dasein is addressed or called upon: 'I am', 'You are.'[108] As announced at the beginning of this Chapter, I intend to extend this enumeration of the personal pronoun in relation to one's own being with 'We are.' To be sure, reading the existential analytic from the perspective of the first- person- plural is not to assert that 'individual' Dasein is

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[103] BT, p. 173, (Italics are mine).
[104] Compare BT, p. 236: '[B]eing towards one's ownmost potentiality-for-being means that in each case, Dasein is already *ahead* of itself [ihm selbst … *vorweg*] …This structure of Being, which belongs to the essential, 'is an issue' we shall denote as Dasein's *being-ahead-of-itself*.'
[105] Agamben 1999, p. 118.
[106] Cf., OHF, p. 7
[107] F. Dastur, *Death: An Essay on Finitude* (translated from French), London: The Athlone Press 1996, p. 44.
[108] BT, pp. 67, 68, translation slightly altered.

preceded by a We, or that it can only truly be itself in community. To analyze the We, in and as Dasein, is simply to say that the We is not indifferent to itself and that to exist as a We is not about realizing an essence or refiguring a substantial identity.

For indeed, Dasein's non-indifference to itself, as well as its *Wesen* as a rising forth, imply that Dasein is reflexively defined as the being for whom its own being is at issue. Dasein is concerned for, takes care of its own self. The understanding of human being as Dasein, thus, brings a reflexive notion of identity into play. Dasein signals that the question of 'what' human being is, invoking a referential identity as physical and mental predicates are attributed to a subject,[109] does not exhaust human being because of the difference between what and who human being is.[110] Saying that for Dasein, its own being is at issue, allows us to grasp the relation of the We to its self. The clarity with which Dastur grasps the point with respect to the I, thus, rings equally true for the We: 'Hence, there is an *ipseity* or an identity of the I that is definitely not to be equated with being a subject for the simple reason that it is never already realized but, rather, always 'to be', and because this 'to be' takes the form of a project of oneself-in-the-world that presupposes no substantial being as foundation.'[111]

Grasping the We as a self, once again stresses that Dasein is placed under the burden of the painstaking task of having to be a self -- however, not in the sense that Dasein has to be something, has to conform to a model, figure a pre-given identity or substance. On the contrary, the ontology of selfhood is an ontology of potentiality.[112] There is already one important ontological implication to be drawn from the notion of facticity. This implication elicits the dynamic of the argument this chapter develops. Facticity is what 'makes' us, in the absence of a god that created us, and in the absence of a subject that posits itself as its own ground. Facticity, indeed, signals that we are groundlessly delivered over to our self. Groundless, the self cannot be the subject or the presupposition of this relation. For, as Nancy rightly argues, 'it is the relation that makes the self.'[113] Indeed, if projection entails being ahead of itself, the self is not prior, but comes after. According to Lindahl, this is exactly the paradox of representation: There is *no We* in the absence of a representation of the We.[114] The self, therefore, not only comes after and is lagging behind. It is, ultimately, also lacking. The self is *introuvable*, incessantly slipping away, eluding its identifications, representations and fixations. With respect to the plural self of democracy, Van Roermund pins down the implications thereof: 'Notwithstanding the fact that all predicates, opinions, or interests in society have to refer to this self to count as political, the political self would not be 'something' tangible as a separate entity, a super-subject of a common

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[109] On the difference between referential and reflexive identity see also Ricoeur 1994, pp.40-55.
[110] Cf., Heidegger, *Introduction to Metaphysics* (translated from German), New Haven/London: Yale University Press 2000 pp. 148-153. Hereafter referred to as IM.
[111] Dastur 1996, p. 44.
[112] Compare also Nancy 1993, p. 186: 'This is what "possibility" means. The relation to the "possible" is nothing other than the relation of existence to itself – which, let us note in passing, is what constitutes the unsubjectiviable mode of the Being of a singular "subject": a relation to the "self" wherein the "self" is the possible.' See also Ricoeur 1994, p. 308.
[113] Nancy 2007, pp. 99, 100.
[114] Cf., Lindahl 2009a, pp. 155-156.

predicate, or a public will beyond all private interests … Thus, a democracy would require not only that spokesmen represent the polity as an authorative self, but also that they account for the 'unmarked rest' from which this self derives its authority. It would celebrate what Rosonvallon has called '*le peuple introuvable*' – the people that only exists in the way it is imagined to present, picture, or narrate itself in scattered representations, pictures and narrations.'[115]

Dasein's improper understanding relates precisely to these identifications, determinations, representations, imaginations and fixations, and is the finite moment in the endless relation of the We to its self. Improper understanding, recall, denotes our understanding from without, whereas proper understanding comes from within, arising out of our own self. As will become clear, proper understanding has, strictly speaking, nothing to say. Improper understanding, on its turn, shields us from this abyssal nothing. Importantly, then, improper understanding is not a distortion or a perversion of the proper. It does not cloak a proper, original, authentic, true and real self that gets lost in an alienating identity. What the improper does conceal – for concealment there is – is rather this slipping away of the self.

4.5 We Are

In order to understand what it means for a We to exist as a self – and hence to exist finite – the proper and improper have to be taken into account. In what follows, I will divide the discussion of the improper and proper over this section and the next. Note that to divide the improper and proper over the course of the argument is not to admit that they can ever appear in pure form or be affirmed independently from one another. In this section, I will discuss the improper, that is, what is *not our* own. Paradoxically, the improper enables us to say 'We are.' As will become clear, this improper saying 'We are' bespeaks of a familiarity and comfort with ourselves and our world. Yet, what is familiar to us is not the same as what is most our own, as will be argued in the next section. Proper understanding, which does not and cannot resound, conveys that the We is also always at discomfort with itself, ill at ease and not at home amidst what is most familiar to it. If familiarity and a sense of ease enables plural exisentence to say 'We', then discomfort and *Unheimlichkeit* remind us that the very declaration of the We is intimately bound up with the inability of saying 'We.'

As explained above, the non-indifference with respect to its own being moves a people to say 'We'. More specific, Dasein declares itself as a 'We are …', that is, as defined by certain socio-linguistic and historico-cultural qualities, and by the values it holds to be true. Yet, even though Dasein can declare itself as a We, and Dasein is in each case our own, we should, Heidegger argues at the outset of the existential analytic, consider the possibility that the we is, paradoxically, not its self whenever it says 'We'.[116] As the We is *not its self* in saying 'We', the *improper* makes itself heard in the very declaration of the We.

[115] Van Roermund (2006), p. 537.
[116] Cf., BT, pp. 151, 152.

Paradoxically, then, Dasein, though reflexively defined as the being for whom its own self is at issue, nevertheless turns away from its self[117] ('daβ es ihm selbst in gewisser Weise ausweicht'[118]) by turning its gaze towards its world out of which it understands itself: 'Dasein is first and foremost fallen away from its proper self as potentiality-for-being and fallen [*Verfallen*] 'into' the world.'[119] Dasein's fall and 'alienation', however, is not a deplorable fact but, as Heidegger has it, a 'positive possibility'[120] that constitutes Dasein's ability to move around freely in its world with the greatest ease. Were Dasein to turn its gaze and merely stare at its self without the back-up of its alienating identifications it derives from its world, Dasein would surely be paralyzed. Evading its self is what gets and keeps Dasein going as the being that it is, that is, as always already alongside with, and absorbed in, its world. That Dasein is first and foremost not its self is not to take us off track, therefore, assuming that what is at stake is the search for an original, authentic self that has to be wrestled from an inauthentic identity in which Dasein is lost and not itself. On the contrary, that the We is not its self in declaring 'We are …', suggests, precisely, that the declaration of the We is not the expression or representation of a prior, already given and established self.

Indeed, recall that the improper refers to Dasein's identifications with what is not (yet) its own. In order to obtain a circumscribed identity, Dasein projects or pictures itself into possibilities into which it is thrown, makes itself an identity in accordance with an image that precedes it. With Dasein, alienation becomes original,[121] implying that Dasein's falling away from itself and its fallenness into its world is, in fact, not 'a fall from a purer and higher 'primal status'.'[122] In falling, Dasein anticipates an identity in and through identification with what is already

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[117] Cf., Ibid., p. 178.

[118] SZ, p. 139.

[119] BT, p. 220, translation slightly altered/ SZ, p. 175. Heidegger here introduces the notion of fallenness, which in the existential analytic appears as the third existential that characterizes Dasein, together with facticity (thrownness) and existence (projection). Most readings of *Being and Time* understand *Uneigentlichkeit* on the basis of Dasein's fallenness, and, more specific, as Dasein's fall into the they (*das Man*). *Uneigentlichkeit* then denotes Dasein's existence as they-self. That Dasein is not its self in saying 'I' is then taken to denote that it is a 'they-self.' One possible reading of the 'interpreting liberation of Dasein' which *Being and Time* aims to be, is, therefore, that Dasein is to wrestle and free itself from this domination of the They that has taken over its existence. *Eigentlichkeit* on this account comes to denote the freeing and wrestling of the self from the they-self. For a discussion of this liberation, and all the difficulties it involves, as well as the ambiguities Heidegger himself runs up to see Visker 1999. Understanding *Eigentlichkeit* as existing as oneself in contradistinction to existing as a they-self to which *Uneigentlichkeit* is reduced, has inspired the long- lasting debate over whether Heidegger, in fact, based his existential analytic of Dasein on a personal preference for some ideal of human existence. The issue of authenticity no doubt crops up here. In fact, I believe that understanding *Uneigentlichkeit* solely on the basis of Dasein's fall into the they has much contributed to the understanding and/or translation of authenticity and inauthenticity. In this chapter, by contrast, I try to understand and make sense of the improper on the basis of facticity, and not, as is usually being done, on the basis of Dasein's fallenness into the they. Understanding both the proper and improper on the basis of facticity brings into view that these two basic possibilities are indeed co-implicated instead of being the two terms of an opposition.

[120] BT, p. 220.

[121] Compare Visker 1999, p. 28: '[Heidegger] knows that the interpreting part of his analysis, the part which is to explain what there is about the Being of Dasein which lets Dasein first and foremost (*zunächst und zumeist*) alienate from itself – from its self – could end up with showing that, in fact, there is no alienation at all, that the reason why alienation is so successful is precisely because there is nothing else than that, because, in short, alienation would be original, a supplement to some frailty in Dasein's Being, a suit of armour without which it could not survive.'

[122] BT, p. 220.

given and what the world is reaching out to it. This anticipatory leap forwards directs Dasein to its future by referring it back to past, i.e., to thrown possibilities.

This anticipatory projection into thrown possibilities, or this identification with what one is not (yet) in the process of (collective) identity formation, is at work whenever the constitution of a people is at issue. Recall from the previous chapter that for the founding act to be legitimate it has to act as if the people already existed, and as if it merely re-presented the people. A people at the brink of its existence thus anticipates itself in and through these representations. Of course, the fiction involved in the 'as if' is not the fiction proper to poetry, as if the people were nothing but a fiction springing from the creative imagination of those who took the initiative to found it. There is, as Nancy observes, an important difference between the fiction involved in poetry and the fiction involved in politics and law,[123] if only because of the circularity involved in the act of constitution.[124] A future, for example the European Union, is anticipated by way of referring back to a past, Europe, which, on its turn, acquires its meaning in and through this very projection.[125] So, if Dasein is always ahead of itself, it is '*ahead-of-itself-in-already-being-in-a-world*.'[126] And precisely because of the circularity involved in the structure of Dasein's being,[127] can Heidegger claim that 'existence is always factical' and that 'existentiality is essentially determined by facticity.'[128]

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[123] Compare Nancy, *A Finite Thinking* (translated from the French), ed. By S. Sparks. Stanford: Stanford University Press 2003, p. 157: '*Dichtung* makes up a world … If poetry fictions, it does so as a theory: a vision that produces visions. By contrast, (juridical) fiction works *with* a world, with the accidental, eventful actuality of a "worldness" that the law neither produces nor sublates. If anything and everything can happen in *Dichtung,* that's because it produces the unlimited field of its own production; if anything and everything can happen for right, it is because there's always something that exceeds the limits of its spaces.'

[124] For more on the circularity involved in the act of constitution see Derrida 1992, p. 36.

[125] The referred circularity gives credit to the invocation of self-evident truths and God in the American Declaration of Independence that Arendt, in her discussion of the American Revolution, tries to downplay as impure and as a sign of a lack of nerve on the part of the founding fathers to face the novelty and greatness of their act. According to Arendt, this novelty lies within the 'We hold' that expresses the power of free men to gather together and bind themselves on the basis of reciprocity and promises. This power, based on reciprocity in and of itself, legitimizes the act of constitution that, therefore, need not appeal to a higher authority or self-evident truths. As Honig reads Arendt in *Political Theory and the Displacement of Politics,* 'the "we" stands as the guarantor of its own performance.' (Honig, *Political Theory and the Displacement of Politics*, Ithaca: Cornell University Press 1993, p. 105). As Honig rightly argues, Arendt here overlooks the fact that the people do not exist as a people prior to the act of constitution. Hence, Honig argues, reading Derrida against Arendt, that recourse to self-evident truths and natural law is not a failure to recognize the power and the acts of men but is, rather, the expression of the awareness that every act of founding has to link up with what has already been established as authoritative: ' On Derrida's account, the signers are stuck in Sièyes' vicious circle. They lack the authority to sign until they have signed. The American founders' invocation of the name of the laws of nature and the name of God manifests this predicament. They appealed to a constative, according to Derrida, not, as Arendt would have it, because of a failure or lack of nerve or because they underestimated the power of their own performance, but because they did not overestimate its power. To guarantee power and secure their innovation, they had to combine their performative with a constative utterance.' (Ibid., p. 105).

[126] BT, p. 236.

[127] Compare Ibid., pp. 194-195: '*But if we see this circle as a vicious one and look out for ways of avoiding it, even if we just 'sense' it as an inevitable imperfection, the act of understanding has been misunderstood from the ground up* ... What is decisive is not to get out of the circle but to come into it in the right way … The 'circle' in understanding belongs to the structure of meaning, and the latter phenomenon is rooted in the existential constitution of Dasein – that is, in the understanding which interprets. An entity for which, as Being-in-the-world, its Being is itself an issue, has, ontologically, a circular structure.' On circularity and facticity see also: Agamben's understanding of the being of Dasein in Agamben 1998, pp. 150 -151: 'The great novelty of Heidegger's thought … was that it resolutely took root in facticity … The circular structure by which Dasein is an issue for itself in its ways of being is nothing but the formalization of the essential experience of factical life, in which it is impossible to

The possibility to say 'We' is thus rooted in our being-in-the-world. That saying 'We are …' bespeaks a polity's familiarity with its world, becomes clear in its everyday life. To be sure, everydayness is not to be mistaken for banality or mediocrity.[129] Rather, it refers to the way Dasein first and foremost comports itself towards the world and understands itself accordingly. Everydayness expresses and assures that business is business as usual. For business to be business as usual, it is required that the We is not explicitly concerned with itself, is not haunted and preoccupied by the question who and what it is. If it is written on a wall 'This is Serbia', and someone remonstrates the slogan by writing 'No, stupid, it is a post-office', he (or she) repossesses a normalcy and everydayness that gets stuck and suspended whenever people start claiming 'This is Serbia.'[130] That the world has its way and we have our way in it is only possible because we dismiss the question who we are, turn away from our self, and act. Indeed, in everyday life Dasein is what it does. To use a phrase of Agamben (a very important phrase in fact): Dasein is always a form-of-life.[131] Heidegger, that is, defines human existence as Dasein precisely because human being is never simply 'mere life' or 'natural life' but also always already its form.

The corruptive effects of the breakdown of everydayness (we all know what happened in the former-Yugoslavia) derive from the fact that people are thrown

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distinguish between life and its actual situation, Being and its ways of Being … For Heidegger, the central category of facticity is not *Zufälligkeit*, contingency – by which one thing is in a certain way and in a certain place, yet could be elsewhere and otherwise – but rather, *Verfallenheit*, fallenness, which characterizes a being that is and has to be its own ways of being. Facticity does not mean simply being contingently in a certain way and a certain situation, but rather, means decisively assuming this way and this situation by which what is given must be transformed into a task.'

[128] BT, p. 236.

[129] And, for that matter, the point of everydayness, as well as Heidegger's reason for discussing it, is not that it proves the dominance of *das Man*.

[130] Thanks go to Leon Heuts who offered the example to me. The anecdote of wall- writing is related in Nedzad Begovic' documentary *Totally Personal* (2005).

[131] Agamben coins the notion of form-of-life to resist the separation of naked law from human life. Those who are reduced to their naked lives are pushed below the threshold of humanity, are deprived of everything that makes their lives worth living, and find themselves in a state of exception. 'By the term form-of-life', Agamben argues, 'I mean a life that can never be separated from its form, a life in which it is never possible to isolate something such as naked life. A life that cannot be separated from its form is a life for which what is at stake in its way of living is living itself. What does this formulation mean? It defines a life – human life – in which the single ways, acts, and processes of living are never simply *facts* but, always and above all, *possibilities* of life, always and above all, power. Each behavior and each form of human living is never prescribed by a specific biological vocation, nor is it assigned by whatever necessity; instead, no matter how customary, repeated, and socially compulsory, it always retains the character of possibility; that is, it always puts at stake living itself.' (Agamben, G. *Means without End. Notes on Politics,* Minneapolis/London: University of Minnesota Press 2000, pp. 2, 3). Agamben clearly draws on Heidegger here. In fact, he even argues in *Homo Sacer. Sovereign Power and Bare Life,* that the political meaning of facticity is this very impossibility of separating a naked life from its form: 'For both Heidegger and National Socialism, life has no need to assume 'values' external to it in order to become politics: Life is immediately political in its very facticity. Man is not a living being who must abolish or transcend himself in order to become human – man is not a duality of spirit and body, nature and politics, life and *logos*, but is, instead, resolutely situated at the point of their indistinction.' (Agamben 1998, p. 153). Importantly, facticity constitutes the decisive difference between Heidegger and fascism: 'Nazism determines the bare life of *homo sacer* in a biological and eugenic key, making it into the site of an incessant decision on value and non-value in which bio-politics continually turns in thanatopolitics and in which the camp, consequently, becomes the absolute political space. In Heidegger, on the other hand, *homo sacer* – whose very own life is always at issue in its very act -- instead becomes Dasein, the inseparable unity of Being and ways of Being, of subject and qualities, life and world, 'whose own being is at issue in its very Being.' (Ibid., p. 153).

back upon 'themselves' and get preoccupied with their identity. In this respect, anthropologists have discerned a noteworthy (and unsettling) difference between refugees confined in camps and refugees who spontaneously settled in the cities to which they fled. The former group of refugees is excluded from normal life, and their lives are suspended in an emptiness in which there is nothing to be done. Their lives, as Agamben would say, are separated from its form. For them there is no business as usual. Harell-Bond, for example, has observed that in the emptiness of camp life, even the most basic skills acquired over generations to cope with the environment are lost.[132] Without everything that makes human life worth living – such as labor, work, providing for themselves and their families – camp-refugees have the horrific experience of being useless. No longer in a position in which they can understand themselves from what they do, they get preoccupied with what they are. Liisa Malkki observed that Hutu refugees who were confined in camps in Tanzania 'engaged in an urgent, collective process of constructing and reconstructing a true history of their trajectory as "a people". This was an oppositional process, setting itself against state-approved versions of the history of Burundi … [T]he Hutu refugees' narratives outlined the lost features of the "autochtonous", "original", Burundi nation and the primordial social harmony that was believed to have prevailed among the original inhabitants …'[133]

The camp-refugees' preoccupation with what they truly are as a people does not at all assure that things return to a normal, everyday state of affairs. On the contrary, it continues to disrupt everydayness, as it sets the stage for hatred and violence. Camps are generally believed to be breeding places that contribute to the continuation of armed conflict. In numerous cases, invasions and armed attacks are launched from camps. By contrast, Hutu refugees who spontaneously settled in host states did not engage in mythologizing their identities as they were busy living, working, acquiring skills required by their new environments, and so forth. Their lives turned back to a normal state of affairs precisely because they, literally, got back to business -- something the camp-refugees explicitly disapproved of. They were even outraged by Hutu refugees who lived in the cities, whom they depicted as traitors, as they engaged in commerce. Malkki reports camp-refugees to have said, 'We have not come here to make commerce. We are refugees.'[134] The refugees in the Mishamo camp in which Malkki conducted her research apparently agreed that a rich refugee was a contradiction in terms: 'The camp refugees recognized that wealth would likely root people in the here and now, making them forget that they were in exile, and, thus, properly rooted elsewhere … [R]efugeeness, ideally, was an integral part of the process of a future return – just as it was inevitably linked to the past.'[135] Indeed, the exclusion of normal life, and the suspension of everyday familiarity, is perhaps best expressed by the fact that for those refugees, business, quite literally, is not business as usual.

From a Heideggerian point of view, everydayness purports to express, precisely, that Dasein, first and foremost, understands itself out of that with which it is

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[132] Harell-Bond, B. 'Pitch the Tents. An Alternative to Refugee Camps', *The New Republic*, September 19 & 26, (1994) p. 16.
[133] Malkki, L. 'Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization', *Cultural Anthropology*, vol. 11 (1996), p. 380. Cf. also Malkki 1995a.
[134] Malkki 1996, p. 381.
[135] Ibid., p. 382.

concerned and for which it is concerned.[136] The everyday manner in which Dasein comports itself to its world and itself is, therefore, that of *concern* [*Besorgen*].[137] Being engrossed in whatever it is Dasein is concerned with, understanding itself accordingly, Dasein, as said, forgets itself, turns away from itself.[138] If who we are is constantly at issue in our public affairs, it would be a sure thing that we would never be able to take decisions and get the job done. We dismiss the question of who we are, and probably say something like: that we belong to this nation, for which we seek to strengthen the economy by investing in innovation, that we defend the right to abortion as fundamentally belonging to the right of women to self-determination, that we are on the lookout for human rights as we believe this makes the world a better place in which to live, determining our foreign policy accordingly, and so forth.

As long as Dasein is caught up by the life and time of the world, it can reassuringly dismiss the question of who it is by saying what it is and what it is doing. In the everyday life of Dasein, *that* it is, is not at issue. In public debate, the We is always the for-the-sake-of-which. The stakes, however, are not explicitly *that* we are, but *what* we are. If we say we are committed to promoting human rights everywhere for everyone, as we believe a safer world is in our best interest, as well, it is only a matter of time before our political opponents object that we are not defending the interests of the people, but are instead supporting a partial interest of a small, wealthy and highly educated part of the people, and that it is, instead, in the interest of the people as a whole to lower the budget for foreign and humanitarian aid. *That* we are is not explicitly or thematically at stake here. Rather, what happens is that different, contesting claims about what we should concern ourselves with, and what best serves our interests are being put forward.[139] Public debate about what we should do and what best represents and serves our interests, is what sets democracy into motion and keeps it going.

And of course, putting forward different contesting claims always takes place in a certain political climate, and always arouses certain moods and sentiments. Public debate is never merely rational but is, for a large part, also affectively loaded. Elation, aversion, sympathy, anger, indignation, desire, apprehension all affect public debate. Defending the right of freedom of speech can be pregnant with a sympathetic regard for and protection of minorities. But the picture changes, as it is changing today, when those minorities are said to threaten our freedom of expression, spurring us to heavily criticize their backward culture and traditions. And even though we believe our intention to emancipate them from their curtailing traditions to be lofty, they feel, of course, cornered. Also, the very use of the suggestive expression 'illegal immigrant' and 'illegal immigration' give vent to

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[136] Compare BT, p. 155: 'This elemental worldly kind of encountering, which belongs to Dasein and is closest to it, goes so far that even one's *own* Dasein becomes something that it can itself proximally 'come across' only when it *looks away* from 'Experiences' and the 'centre of its actions' or does not as yet 'see' them at all. Dasein finds itself proximally in *what* it does, uses, expects, avoids – in those things environmentally ready-to-hand with which it is proximally concerned.'

[137] Compare BT, p. 84: 'Because Being-in-the-world belongs essentially to Dasein, its being towards the world [Sein zur Welt] is essentially concern.'

[138] Cf., BT, p. 405.

[139] This is how Plotke understands political representation. Cf., Plotke, D. 'Representation is Democracy', *Constellations. An International Journal of Critical and Democratic Theory*, vol. 4 (1997), pp. 19-34.

feelings of anxiety and resentment as it implies a connection between immigration and criminal law. Or, to give a wholly different example, if we read Tolstoy's *War and Peace,* we know that Napoleon, though he truly intended to keep peace with Russia, nevertheless, despite himself and his intention to stay calm, went to war, as he couldn't help being irritated, outraged and hurt by the stupidity and ingratitude of the Tsar.

So, according to Heidegger, indeed, every understanding of Dasein has its mood,[140] is attuned and affective: 'A mood [Stimmung] makes manifest 'how one is, and how one is faring' ['wie einem ist und wird']'.[141] Not only does a mood tell us *how* one is, it also discloses *where* one is, as is still retained in the German expression of *Befindlichkeit.*[142] So, if it is said that Dasein always already finds itself in the world,[143] the meaning thereof is threefold: First, it refers to the *where* of Dasein, to the place it has taken up on the basis of a circularity that directs its concerns and projections which expresses, secondly, that Dasein always already has some pre-understanding of itself and its world, and, thirdly, does so in affective way.[144]

4.6 Concern and Order

That the world has its way, and Dasein has its way in it, is conditioned on Dasein's affective understanding of itself out of that with which it is concerned. Obviously, we are always concerned with some 'thing', for which Heidegger coins the notion of equipment [*Zeug*][145] so as to stress the instrumentality thereof. Certainly, the notion of equipment and equipmentality is not to lead us to believe that concern is restricted to the work and labor of our hands. In fact, putting forward multiple, contesting claims about what best serves our interests as a people, pretty well illustrates what concern amounts to. According to Heidegger, concern entails 'having to do with something, producing something, attending to something and looking after it, making use of something, giving something up and letting it go, undertaking, accomplishing, evincing, interrogating, considering, discussing, determining … All these ways of Being-in [i.e., Being-in-the-world, NO] have *concern* as their kind of Being […].'[146]

Now, it is important to note that *besorgen* has an additional, somewhat archaic, meaning which gets lost in the English translation of 'concern.' *Besorgen* also means something like making sure that all ends up well, that things end up in the right

[140] Cf., BT, 182.
[141] BT, p. 173.
[142] Cf., PM, 87.
[143] Compare Ibid., p.128: ' As finding itself [*sich befinden*] Dasein is *absorbed* by beings in such a way that, in its belonging to beings, it is *thoroughly attuned* by them … With this *absorption* by beings that belongs to transcendence, Dasein has taken up a basis within beings, gained ground.'
[144] Compare BT, p. 176: ' A mood assails us. It comes neither from 'outside' nor from 'inside', but arises out of Being-in-the-world, as a way of such being […] *The mood has already disclosed, in every case, Being-in-the-world as a whole, and makes it possible first of all to direct oneself towards something.*'
[145] Cf., BT, pp. 96, 97.
[146] BT, p. 83.

place suited to them.[147] For the economy to properly function, for example, it is required that the tomatoes we grow are distributed, either to a grocery in town or exported to a foreign country, instead of lying rotting in the fields, and it wouldn't be a very good idea to make a philosopher a stockjobber, or put her in charge of a national bank. Indeed, *besorgen*, concern, as Heidegger understands and expounds it, is what assigns to things a place suited to them.[148] Concern, in short, is what gives and ensures order.

So things never merely are. Instead, they are taken up and function within a meaningful network of relations in which one thing always refers to another, and derives its meaning and function from this reference.[149] The meaningful unity of this chain of connections is constituted by the 'in-order-to', the 'at-which', the 'towards which' [150] and the primary 'towards-which' (or the for-the-sake-of-which),[151] which, as we saw before, is Dasein, itself. So, we use genetic engineering in agriculture (at-which) in order to make fruits and vegetables immune for certain diseases with a view to increasing the yield of production so that we can feed ourselves. Things are referred and assigned to one another[152] and in thus being referred and assigned, they are given direction.[153] Things are fixed in a direction for, in, and through our concern with them, implying that the *where* of things is not to be understood as some arbitrary position or occurrence in space [*Stelle im Raum*], but rather refers to the place [*Platz*] where they belong [*Hingehören*][154] or do not belong [*in der Weise des Nichthergehörigen*].[155] Concern emplaces things, bringing with it the possibility that things are misplaced. Note that things can only be misplaced *within* this meaningful network of relations and *within* this *Platzganzheit*[156] or *Platzmannigfaltigkeit,*[157] i.e., against the backdrop of the place assigned to them.[158]

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[147] In Dutch, for example, we have the expression 'zijn kinderen bezorgen' which means taking care that one's children end up well.

[148] So, Dasein, first of all, encounters things within its world in and through its involvement with them or its concern. More precise still, it is in and through Dasein's concern that things are discovered. Concern is a 'freeing' (Cf. BT, p. 117) of things on the basis of Dasein's spatiality in which things can be here or there. Compare BT, p. 146: 'When we let entities within-the-world be encountered in the way which is constitutive for Being-in-the-world, we 'give them space'. This 'giving space', which we also call '*making room*' [*Einräumen*] for them, consists in freeing the ready-to-hand for its spatiality. As a way of discovering and presenting a possible totality of spaces determined by involvements, this making room is what makes possible one's factical orientation at the time. In concerning itself circumspectively [umsichtiges Besorgen] with the world, Dasein can move things around or out of the way or make room for them [um-, weg-, und "einräumen"] only because making room – understood as an *existentiale* – belongs to its Being-in-the-world.'

[149] Compare BT, p. 120: 'These relationships are bound up with one another as a primordial totality; they are what they are as this signifying [Be-deuten] in which Dasein gives itself beforehand its being-in-the-world as something to be understood. The relational totality of this signifying we call "significance" [*Bedeutsamkeit*]. This is what makes up the structure of the world – the structure of that wherein Dasein as such already is.'

[150] Cf., BT, pp. 97-101.

[151] Cf., BT, pp. 116-117.

[152] Cf., BT, p. 97.

[153] Cf., BT, p. 135.

[154] Cf., SZ, p. 102.

[155] Cf., SZ, p. 73.

[156] Cf., SZ, p. 111.

[157] Cf., SZ, p. 102.

[158] Compare BT, pp. 135, 136: '[w]hat is close in this way gets established by the circumspection of concern, with regard to the direction in which the equipment is accessible at any time. When this closeness of equipment has been given directionality, this signifies not merely that the equipment position [Stelle] in space as present-at-hand somewhere, but also, that as equipment, it has been essentially fitted up and installed, set up, and put to rights. Equipment has its *place* [*Platz*], or else it 'lies around'; this must be distinguished, in

Heidegger surely has his way of putting what is so familiar and close to us at a distance, and of turning everydayness into something which is highly unusual. This is exactly why, as he explains, the whole network of meaningful relations and the distribution of places recedes in the background, remaining implicit just as Dasein's own self retreats from conspicuousness.[159] Indeed, concern denotes our pre-reflexive involvement with things on the basis of our always already being-in-the-world which is familiar *beforehand*: 'Any concern is already as it is, because of some familiarity with the world.'[160] It is no coincidence that Dasein's facticity is introduced in the context of Dasein's everyday way of comporting itself towards its world, as Dasein is delivered over to exactly this meaningful network. The world is familiar to Dasein on account of its facticity: 'This everyday way in which things have been interpreted is one into which Dasein has grown in the first instance, with never a possibility of extrication. In it, out of it, and against it, all genuine understanding, interpreting, and communicating, all re-discovery and appropriating anew, are performed. In no case is a Dasein, untouched and unseduced by this way in which things have been interpreted, set before the open country of a 'world-in-itself' so that it just beholds what it encounters.'[161] Put differently, and in terms we have already used, for Dasein, order has always already begun. And, precisely because of that, it wouldn't bring Dasein very far to just behold what it encounters, waiting for the world to reveal itself.[162] Note that concern also has the structure of projection: Though the motivation to promote human rights for everyone everywhere does not come out of the blue – in fact, when we constituted ourselves as a European We, we affirmed our attachment to these values – we do not know what it is exactly and what it entails unless and until we get started with it.[163]

Now, of course our involvement with things can get stuck. In fact, it gets stuck all the time. Bank managers (even though they are not philosophers) can plunge the financial market into a worldwide economic crisis. Fighting illegal immigration does not, in fact, reduce illegal immigration as we hoped it would do, but instead contributes to the increase of it. Dumping our tomatoes in poor African countries robs indigenous farmers of their labor, as they cannot produce tomatoes at such a low price; and, as they are forced to live below the means of subsistence, our tomato-export is sure to backfire at us, as the farmers are forced to move to Europe where they work illegally in our tomato industry. Bad weather can hamper traffic, causing us to be late to work, or to not be able to arrive at the office at all, and the bike I deemed to be my property has been taken away from the shelter. But this wavering is possible precisely because of the binary logic that structures the meaningful references and assignments of things to each other and that determines the place suitable to each: Things are where they belong or don't belong.

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principle, from just occurring at random in some spatial position. When equipment for something or other has its place, this place defines itself as the place of this equipment – as one place out of a whole totality of places directionally lined up with each other […] Such a place, and such a multiplicity of places are not to be interpreted as the "where" of some random Being-present-at-hand of things. In each case, the place is the definite *Dort und Da* of an item of equipment which *belongs somewhere*.'

[159] Cf., BT, p. 100.

[160] BT, p. 107.

[161] BT, p. 213.

[162] Cf., BT, p. 98.

[163] To use one of Heidegger's own examples to underscore the structure of projection in our concern: The less we just stare at the hammer, the more we seize hold of it and use it (Cf., BT, p. 98).

Significance and familiarity stand out against the possibility of the 'not.' Something is missing, acting up, not properly functioning, lying around, not being where it is supposed to be, and so on. These disturbances and interruptions of the proper functioning of the significant and meaningful context, which normally remains implicit, causes it to become conspicuous for a moment: '[*W*]*hen an assignment has been disturbed* – when something is unusable for a purpose – then the assignment becomes explicit.'[164] But precisely because the assignment becomes explicit and the referential context lights up, we know what to do. By becoming explicit, it provides us the correctives, and informs us about what has to be done for order to be restored again.

Take the example of the legal order.[165] The category of the illegal serves as a good example of an interference that makes the totality of assignments and references salient. Consider, in this respect, how Lindahl understands trespassing: '[S]omeone enters a place where s/he ought not to be. In such cases, a distribution of ought-places lights up as a *whole*, because it becomes apparent that the misplaced person ought to be in any one of those ought-places, rather than *this* one. Acts that trespass spatial boundaries render conspicuous the familiar unity of a totality of legal places as assigning a certain place to an individual (or debarring him/her from that place), and which the individual does *not* (or does) occupy.'[166] The illegal thus renders conspicuous *and confirms* the legal order. An illegal act does not, therefore, put the We fundamentally into question, but instead, affirms it as the subject authorized to draw the line between here and there, spacing out places where things and persons ought to be.

Concern, as Dasein's everyday comportment to a familiar world, thus comes into view as a taking care of the continuation of an order that has always already begun. Concern plays on and ensures that the world has its way, and that the We has its way in it. As long as the We is concerned with and for things, it is able to express itself as a We: 'In talking, Dasein *ex*presses itself [spricht sich … *aus*] not because it has, in the first instance, been encapsulated as something 'internal' over against something outside, but because, as Being-in-the-world, it is already 'outside' when it understands. What is expressed is precisely this Being-outside…'[167] Hence, we see the relation between concern, everyday familiarity, the improper, and saying 'We.' This sequel discloses the existential meaning of being-*in*- the world.[168] In short, it is on account of Dasein's familiar being in the world that it can declare itself as a We.

Note that if the We is taken as Dasein, what brings about and unifies the We is not primarily a common interest or some qualified property, but, before anything

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[164] BT, p. 105.

[165] On the relation between the legal order and everydayness see Veraart, W. *De Passie voor een alledaagse rechtsorde. Over vergeten, herinneren en vergeven als reacties of historisch onrecht*, Den Haag: Boom Juridische Uitgevers 2010.

[166] Lindahl (2010), p. 40.

[167] BT, p. 205.

[168] Compare BT, p. 80: ' 'In' is derived from *innan* – 'to reside', '*habitare*', 'to dwell' [*sich auf halten*] … The being to which Being-in in this signification belongs is one which we have characterized as that being which, in each case, I myself am [*bin*]. The expression '*bin*' is connected with '*bei*', and so '*ich bin*' [I am] means in turn 'I reside' or 'dwell alongside' the world, as that which is familiar to me in such and such a way. 'Being'[*Sein*], as the infinitive of *'ich bin*'… signifies to 'reside alongside ….', 'to be familiar with …'

else, concern.[169] By virtue of its concern, Dasein takes care of itself. What properly belongs to Dasein, therefore, is not some interest or common property that comes first and unites each and everything as belonging to the same totality. Rather, 'care [*Sorge*] is here seen as that to which human Dasein belongs.'[170] So, already in *Der Spruck des Anaximander,* Heidegger emphases consideration, concern, care in relation to order, intimating that to assign to each its due is to be concerned for what is being ordered: 'Insofar as beings which linger awhile give order, each being thereby lets care belong to the other, lets care pervade its relations with the others […].'[171]

Concern is what gives place to things and persons. According to Heidegger, concern is, therefore, rooted in Dasein's spatiality: 'Here and there are only possible in a *Da* – that is to say, only if there is a being that as being *Da* has disclosed spatiality.'[172] But if Dasein's spatiality comes down to spacing out places, this raises the question as to Dasein's *own* place. And, indeed, Dasein, too, is said to have a place of its own: 'Dasein's existential spatiality, which thus determines its 'place' ['*Ort*'], is itself grounded in Being-in-the-world.'[173] But what does Dasein's emplacement amount to? To what or to whom does it owe its emplacement?[174]

Part of the answer has already been given: Dasein's 'place' is grounded, Heidegger says, in its being-in-the-world. Dasein, recall, understands its world by projecting itself in it, and by thus projecting itself, it takes up a place in the world. The line between here and there is not drawn as if carving it out on an empty space. Rather, Dasein has a 'place' of its own by virtue of the circularity and facticity involved in its improper understanding. There is no way out of this circularity. Here is how Heidegger, in *Einführung in die Metaphysik,* understands what he calls Dasein's *Ausweglösigkeit*: '[H]aving no way out [for human beings] does not arise in the external sense that they run up against outward restrictions and cannot get any farther. Somehow or another, they precisely *can* always go farther in the and-so-forth. Their not having a way out consists, instead, in the fact that they are continually thrown back on the paths that they themselves have laid out; they get bogged down in their routes, get stuck in routes, and by getting stuck, they draw in the circle of their world […] In this way they turn around and around within their own circle. They can turn aside everything that threatens this circuit. They can turn every skill to the place where it is best applied.'[175]

The very circularity involved in improper understanding is precisely what enables Dasein *to go farther,* as it enables it to take up a starting point from where to proceed and continue. To go farther, clearly, is something else than a frenetic repetition of the same. Why this is so becomes clear if it is kept in mind that facticity and circularity inform that Dasein makes itself an identity in accordance with an image that precedes it. Dasein, recall, anticipates itself in identifying with

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[169] Cf. also Esposito 2010, p. 16.
[170] BT, p. 243 (translation slightly altered).
[171] Heidegger, *Early Greek Thinking* (translated from the German), Harper & Row Publishers, San Francisco, (1984), p. 47 (translation altered).
[172] BT, p. 171, (translation slightly altered).
[173] BT, p. 171 (translation slightly altered).
[174] The question is highly inspired by Lindahl's phrasing of the problem. Compare Lindahl (2004), p. 479: 'Yet if legal authorities emplace human behaviour by virtue of being themselves emplaced, to whom do they owe their own emplacement?'
[175] IM, p. 168.

what is not itself. Every identification, therefore, comes too early, and Dasein itself always comes after. So, even though Dasein determines itself as the ultimate for-the-sake by way of circumscribing itself to place, it never coincides with that place. It is, therefore, in a sense, always unhomely and untimely. It is, therefore, no mere coincidence that when Dasein's own place is at issue in *Being and Time*, 'place' is put between inverted commas. This suggests, precisely, that Dasein's own *place* is never entirely its *own* place. It is exactly this point Lindahl incisively makes with respect to the European Union's claim to represent Europe: 'So, paradoxically, everything begins with the representation; the original place of the EU is necessarily a represented place, and its boundaries represented boundaries. Consequently, Europe is, properly speaking, a *utopia*; it is nowhere and 'nowhen.'[…] The reflexivity implied in self-legislation, self-determination and the like, is necessarily mediate, representational. There is no absolute 'here' and 'now' that could attest to and guarantee this – or any other – community's *self*-foundation […] This is tantamount to recognizing that the EU's place in the legal world is not fixed […] The irreducible gap between Europe and the EU ensures that Europe is never entirely the EU's own place.'[176] As will be argued in the next section, proper understanding arises precisely from this nowhere, and speaks from the void.

4.7 We Are Dying

Recall that Dasein's understanding, whether proper or improper, constitutes Dasein as potentiality-for-being on account of the projection into thrown possibilities which leaves Dasein ahead of itself. Now, if proper understanding arises from within, this implies that among the possibilities into which Dasein is thrown, there must a possibility that is not handed down from the world and that Dasein does not share with others. There must be a possibility, that is, that solely belongs to Dasein as its own. Here, a crucial stage of the exposition of Dasein announces itself. For the required possibility, according to Heidegger, is the possibility of death. So even though there is no way out of Dasein's turning around in circles, there is one thing against which all circling shatters: 'That is death.'[177]

To put death as a possibility that solely belongs to Dasein into relief, let me briefly shift from the register of the We to that of the I. This easily allows death to be contrasted with possibilities Dasein shares with others. Take the example of the female gender in which Dasein is thrown.

Though I certainly don't want to be reduced to that, it is something that matters to me and that I try to figure out by looking at other women, picturing myself (or not) in what they say and do. I choose my examples. But with death I cannot do that. I do not know what death or dying is because there is absolutely no way in which I can experience it. Looking at how others die won't solve the problem. I cannot, that is, experience my own death, my own not-being, by looking at that of others. Sure, I mourn the death of the ones I love. But what I cannot experience is, precisely, his or her own loss. We do not, Heidegger says, experience

[176] Lindahl (2004), p. 479.
[177] IM, p.168.

the death of others; at most, we are always just 'there alongside.'[178] This is not to say, of course, that the other's death is indifferent to me, that it does not affect me.[179] But the point of the matter is that, precisely because his or her death *affects me,* I do not and cannot experience it as his or her *own* death. So, even though Dasein always already shares its world with others, even though *mitsein* essentially belongs to Dasein, death definitely separates one Dasein from another. Death does not come as the great equalizer. On the contrary, death is what separates and throws us back upon our self. Death, Heidegger says, is always our own: 'Dying is something that every Dasein itself must take upon itself at the time. By its very essence, death is always my own, insofar as it 'is', at all.' [*Der Tod ist, sofern es 'ist', wesenmäßig je der meine*].'[180]

Seemingly, the attempt to reread the existential analytic from the perspective of the first person plural, founders here. Admittedly, from Ancient History to Modernity, the question of community has bordered on death. Myth tells us that community is founded on patricide and fratricide, and Hobbes' Leviathan is said to project its subjects against the killing of each other. But in these cases, death, or the possible killing, are believed to originate community, which is something quite different than saying that the We is dying, if only because this amounts to the We's not being and absence, whereas the constitutive killing is believed to bring community into being. Indeed, the possibility of not-being seems to be at odds with the very concept of sovereignty. Bodin, in his *Les six livres de la république,* (1576) argued that the law declares that the people never dies. In particular, death seems to be at odds with the concept of popular sovereignty, which centers around the freedom and identity of a given people and, hence, implies being, existence and appearing. Indeed, wouldn't it be more plausible to associate 'people', 'freedom' and 'constitution' with birth and/or immortality? As Arendt has argued, political order gives permanence to the fleeting words and deeds of mortal men, inscribing their lives in the reliant and enduring immortal story of a people, linking generation after generation to the origin, the constitution of the polity.[181] Indeed, Arendt, in a rather infelicitous turn of phrase, even noted that the evil of nuclear war does not

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[178] BT, p. 282.

[179] Of course, that we are 'just there alongside' the other's death *has* been interpreted in terms of a complete indifference and total lack of care for the other, evoking an almost insurmountable abhorrence in many a reader of *Being and Time.* Critchley, shocked by the non-relational character Heidegger attributes to death, therefore opposes that we are 'just there alongside', arguing that 'death is, first and foremost, experienced in a relation to the death or the dying of the other and others, in being-with the dying in a caring way, and in grieving after they are dead.' (Critchley 2008, pp. 140-141). Finitude, on this account, is essentially relational, as we 'experience' it with the deaths of those we love. In her discussion of the fundamental difference between my own death and the death of the other, Dastur puts the finger on the blind spot in this kind of reasoning: 'One may well think that 'what one calls by the somewhat tarnished term love, is, *par excellence,* the fact that the death of the other affects me more than my own', and this explains why one can decide to die 'for' another. But, that cannot mean to die 'in his place', since while one may manage to delay the moment of his death, it is, on the other hand, strictly impossible to deliver the other from his or her own mortality. So, one can only secure for the other a little more time, not immortality – to the point where, even in the case of sacrifice performed out of love, it is not, in fact, a question of the death *of* the other but, rather, of the irreparable loss this would be *for us* who prefer not to live on after it. It is just because, in that special form of being with the other in which love consists, I include *myself* in the other's death, that I shall never be able to have the experience of *the other's own mortality.*' (Dastur 1996, p. 48).

[179] Cf. BT, p. 144.

[180] BT, p. 284/SZ, p.240 (translation slightly altered).

[181] Cf., Arendt 1959, pp. 175-177.

consist in the mass killing of men 'who must die in any case', but in the elimination of 'a whole people and its political constitution, both of which harbor the possibility – and in the constitution's case, the intention – of being immortal.'[182]

And even if we do expect that our community will one day come to an end as our body politic is prone to decay, as Rousseau is there to remind, this is still something different than Heidegger's reflection upon death tries to tell us. For even though we know Rome decayed and perished, calling us to modesty not to expect our own state to be eternal,[183] there is absolutely no information to gain from this with respect to our own end as a We. Rousseau compares the decay of the body politic with the natural death of our body, and seems to understand death as an outer limit, a biological fact against which all human life runs counter, a passing away, a ceasing to exist that awaits us at the end of the road. Indeed, we all *expect* to die someday; we all know that one day death will be *real* for us. But precisely this understanding of death as something to be expected that will eventually be real, deprives death of its essential character as possibility Heidegger is driving at.

What makes Heidegger of special interest to our inquiry into the finitude of the We qua self is that he takes issue with a concept of finitude as referring to something unlimited, or as derivative of infinity -- and hence, as a passage to, for example, another we. Heidegger seriously doubts that finitude is exhaustively dealt with when limited to a negativity that manifests itself as a deprivation or failure of infinite possibilities out of which Dasein selects a few in order to determine and be itself. There is more to finitude, he suggests, than the necessary limitation of freedom. He, therefore, tries to think finitude as finitude, that is in its independency, and not as merely derivative of infinity. For Heidegger, this means that finitude be thought from the problem of death.[184] As he refuses a privative reasoning when it comes to finitude and death, death for him is not what it has been in philosophy ever since Plato, i.e., a passage to the other side. Taken in an existential sense, death does not set the immortal human soul free from its imprisonment in the mortal body. Nor, does it suffice to understand death as something we humans have to reckon with. On the contrary, if death is to render finitude conspicuous it must be taken in its existential-ontological sense, that is, as a possibility into which Dasein is thrown and that immanently belongs to it. Thus, in *Introduction to Metaphysics,* Heidegger explicates: 'The human being has no way out in the face of death, not only when it is time to die, but constantly and essentially. Insofar as humans *are*, they stand in the no-exit of death. Thus Dasein is the happening of un-canniness itself.'[185] So, death or dying appears as a possibility to which we always already relate, that is: as a way of being.[186]

What this means becomes clear if Dasein's understanding is exposed as always intimately bound up with death. Insofar as death is a possibility, Dasein's understanding of itself, by virtue of its projections into thrown possibilities, always already anticipates its own end, its own absence. Every projection, therefore, every

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[182] Arendt, H. *The Promise of Politics*, New York: Schocken Books 2005, p. 161.
[183] Cf., Rousseau, J.J. *Du Contrat Social*, Hachette Littératures 1972 pp. 292-294.
[184] For an excellent and instructive reading of Heidegger's phenomenological approach to death and finitude, see F. Dastur, *Death: An Essay on Finitude* (translated from the French), London: The Athlone Press 1996.
[185] IM, p. 169.
[186] Compare BT, p. 291: 'Let the term '*dying*' [*Sterben*] stand for that *way of Being* in which Dasein *is towards* its death.'

representation of identification, is ridden with the possibility of not-being. And this is what it means to exist finite, which is but another way of saying that death is not something that eventually befalls Dasein. Rather, Dasein is factically dying as long as it exists.[187]

This factically dying was already implicit in Dasein's being-ahead of itself. Indeed, recall that Dasein, insofar as it understands itself by, in, and through its projections into thrown possibilities, that is, into something which it is not yet, runs ahead of itself. Dasein's projections, identifications, and representations always come too early, so to speak, and Dasein remains forever too late to catch up with it. Dasein never coincides with itself, which is why, exactly, its own self is an issue for it. Falling apart implies that for Dasein to exist means: having to endure its own absence. Death is the proper name for the absence of oneself that is irreparable in spite of – or rather because of – all projections by which it tries to make itself an identity. This is why being-ahead-of-itself has, indeed, 'its most primordial concretion in Being-towards-death.'[188]

Being-towards-death has little or nothing to do with reflecting upon death, worrying about it, wondering what comes after, imagining who will attend our funeral, or expecting it to happen, and so on. All of these and other ways of dealing with death pull it within the circle of everyday familiarity, as if our own death is something with which we can concern ourselves. But concern converts what is possible into what is available; it does not relate to the possible, as such, but rather, to the possible *realization* of something.[189] But being-towards-death means: having to endure one's own absence instead of striving to realize it for oneself. The 'function' of death, so to speak, in the existential analytic of Dasein, is to reveal that the not-yet that constitutively marks Dasein does not appear against the backdrop of something that has to be there, and that one day will be real (an essence, a substance, an ideal or identity). Death ensures that the not-yet does not disappear in the closure of an achievement, but instead, continues to be the opening that it is. Death is there to remind us that there is always something which refuses our getting hold of it, that there always remains something that cannot be realized. And because of that, death, according to Heidegger, is a *pure* possibility, that is, a possibility that cannot be destroyed by passing over into something actual, real or present. As pure possibility death is, therefore, the *possibility of impossibility* that drives us, not to something real and present, but to nothingness and absence: 'Death, as possibility, gives Dasein nothing to be 'actualized', nothing which Dasein, as actual, could itself *be*. It is the possibility of the impossibility of every way of comporting oneself towards anything, of every way of existing.'[190]

Death is not a passage. It is the end, exposing Dasein to the *nothingness* of its own being. With death, *nothing* instead of *something* becomes manifest. The nothingness of death watches over the possible, ensuring that Dasein's finitude is not a failure or a lack or an imperfection with respect to something that is, or has to be, there. Death guarantees that Dasein is potentiality-for-being.[191] Death, in

[187] BT, p. 295.
[188] BT, p. 294.
[189] Cf., Dastur 1996, pp. 57, 58.
[190] BT, p. 307.
[191] Cf., Dastur 1996, p. 54.

short, *enables Dasein to be*. Hence, it is in relation to death that 'Dasein's character as possibility let's itself be revealed most precisely.'[192]

The question that arises is if and how death – as the proper name for our own absence and powerlessness – bears upon the We. Is there something that attests to the fact that the We has to endure a possibility it cannot realize, which remains and upon which it nonetheless relies? Can popular sovereignty be said to imply the possibility of its own not-being, its own absence that does not threaten it from outside, but that, instead, fundamentally belongs to it? Only if these questions can be positively answered will it make sense to say that the We is always already factically dying.

4.8 The Exception

To answer the question what testifies to the possibility of not-being from within a polity's existence, I return for a last time to the case of the Haitian refugees held at Guantanamo. Recall from Ratner's discussion of the case that government intended to sue the lawyers for making an unfeasible and frivolous case. Apparently, government assumed that the situation of the Haitians did not constitute a case of law. Government's reasoning certainly was appalling. Yet, it makes salient that before actual judgment on a case, it first has to be decided whether or not the particular fact and circumstances can be judged according to law.

Indeed, as is well known, law does not foresee in all possible future cases and hence, contains no information about its application.[193] Hence, the old syntagma *ius in causa positum*, which expresses that law has to set the relation to the case *hic at nunc* in question.[194] The moment of decision manifests itself precisely in setting this relation, as it is here decided that a case does or does not belong to law. What is involved in every decision, therefore, is the separation from law and non-law, inside and outside. Otherwise still, it is by virtue of decision that law reaffirms itself, as the decision sets the limits of law again and anew.

It is tempting to regard the decision as the ultimate act of inclusion and exclusion. But it should be kept in mind that the decision renders the process of inclusion and exclusion to be far more complex than positioning an inside over against an outside. For, if decided that a fact does not belong to law, it is not simply excluded from law but, rather, excepted. And what is excepted from law differs from what is excluded in a decisive way.

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[192] BT, p. 293.

[193] Compare Agamben (2005), p. 40: 'In the case of law, the application of a norm is in no way contained within the norm and cannot be derived from it; otherwise, there would have been no need to create the grand edifice of trial law. Just as between language and world, so between the norm and its application, there is no internal nexus that allows one to be derived from the other.'

[194] The syntagma also expresses, of course, that law is and is not a general rule that absorbs singular facts. Nancy eloquently puts the ambiguity: 'The 'essence' of right stems from the singular relation of accident to essence. *De jure*, the law ought to be the universal code whose very definition implies the annulment or the reabsorption of any accident. *De facto* (but this fact is itself constitutive of right, is itself the very fact of jurisdiction) cases ought to be referred and legitimated, case by case.' (Nancy 2003, p. 155).

Consider again the argument according to which order is brought about by the selection of what is worthy of legal protection, and the exclusion of what is discarded as such. Note that, in contradistinction to what is included, which is always determined and identified, what is excluded is relatively undetermined. Generally speaking, what is excluded is pushed to the margins where the light does not reach; it is what is veiled in darkness and what is not articulated with respect to what is inside. And if it does get articulated, this articulation comes by way of a contestation of the current order. As Lindahl argues: 'This indeterminacy comes to the fore in cries such as 'Another Europe is possible'.'[195] What is excluded, in other words, is a latent possibility of another We.

But whereas what is excluded is relatively undetermined and indifferent (until such time as it manifests itself by claiming another We), the exception, by contrast, is relatively determined and not indifferent. Law, after all, has explicitly concerned itself with it in the decision not to apply. Having concerned itself with it, having touched upon it, the law withdraws itself from it, suspends itself in this case. But what is excepted, nevertheless, maintains itself in a relation to the law, precisely because the law withdraws from it, applies to it, as says Agamben, in no longer applying.[196] What is excepted from law is, therefore, not simply excluded and diverted back to the other side of law, but is, rather, included by means of its very exclusion. For this reason Agamben understands the exception as a kind of 'inclusive exclusion'.[197]

The exception, to which the law does not apply, does not, for that reason, belong to law and cannot, therefore, properly be located inside. Yet to the extent that law has concerned itself with it, has touched upon it, it is not simply excluded from law and cannot be properly located outside. The exception is neither included nor excluded, neither inside nor outside. Rather, the exception is the threshold between inside and outside.[198]

Insofar as the decision on the exception sets the limits of law again and anew, it proves to be constitutive of law. Situated in-between the exception is the condition of possibility to separate inside from outside. Yet, the exception is also what, at the same time, shatters this distinction. Being included by means of law's suspension, the exception breathes an air from outside in, so to speak. The exception signals that what is inside does not simply coincide with what is selected and included as

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[195] Lindahl (2008) p. 128. Note that Lindahl's argument fundamentally differs from the one put forward by Benhabib. Lindahl's argument proceeds from the conditions that govern the constitution of legal order, i.e., the a-legal act of founding, which take hold of the further existence of legal order. The upshot of a-legality is that *no* legal order can ever fully realize itself, and is haunted by questions as to its legitimacy and unity. Legal order is, therefore, subjected to an ongoing contestation that challenges the boundaries that separate inside from outside. Benhabib, by contrast, frames contestation as a challenge to collective identity, i.e., to what the people is. As argued in the previous chapter, what cannot legitimately be contested on this view is who legitimately makes up the people. Contestation is ultimately dependent on the good-will, so to speak, of the people to give effect to the right to have rights as it is claimed by those excluded. Benhabib seems to follow a rather simple scheme of inclusion and exclusion without remainders, which is why she can express the hope of 'ever wider inclusions' to occur. For a critical reading of Benhabib's theoretical framework of inclusion and exclusion, see Honig 2009, p. 125.

[196] Cf., Agamben 1998, p. 17. On the relation between the unity of law, decision and exception see also Roermund, B, van. 'De rechter: grenswachter of grensganger?', in Broers, E.J. & Van Klink, B. *De rechter als rechtsvormer*, Amsterdam: Boom Juridische Uitgevers 2001 pp. 159-162.

[197] Cf., Agamben 1998, p. 21.

[198] Cf., Agamben 2005, p. 57.

properly belonging. In the same blow, it reminds that what does not belong cannot be properly located outside.

Breathing an air from outside in, whispering, as it were, that there is something strange or improper to what is inside, while something that is 'outside' appears to belong to the constitutive core of what is inside, making it more intimate than we thought in the first place, the exception is, as Agamben says, the 'principle of infinite dislocation'.[199] The exception wanders inside, as it were, causing the non-coincidence between 'inside', 'inclusion', 'belonging' and 'membership'.[200] If what is excluded is a latent possibility that is not yet included or realized, the exception, which is neither included nor excluded, is what persistently slips away. The exception is not simply a failed possibility. The exception is what remains, so to speak. It is what incessantly slips away from order, and what does not, nor ever will, appear, exposing order to a more persistent 'not', a more intrusive negativity. The exception is a possibility that cannot be realized, intimating, that is, a possibility of impossibility. As such, the exception deepens our sense of finitude as it draws near, not to what is absent in light of what is currently present, but to what is absent, as such. It draws near, that is, to the possibility of impossibility.

The exception, which is constitutive for order, signals the power of law to maintain a relation with reality that it both has to presuppose and establish.[201] At the same time, however, it highlights the powerlessness of law to ever fully consolidate itself. As the principle of infinite dislocation, the exception reminds us that democratic legal order relies on something it cannot appropriate, cannot make its own. The exception, therefore, corresponds to the radical finitude of a polity's existence.

As the exception is neither inside nor outside, it does not appear. Yet, the exception, which signals the non-coincidence between inside, inclusion, identity, is nevertheless that which is incessantly and insistently present. Present and pressing, yet not apparent, the exception manifests itself paradoxically as arising from within, making our existence as a people essentially and existentially insecure. Insecurity, therefore, fundamentally has something to do with the possibility of not-being that lies within. As Lindahl eloquently argues 'only beings for whom questionability is their mode of being, i.e. that have to deal with the residual groundlessness concerning what they are and that they are, can be insecure.'[202] Only if this sense of insecurity is taken into account are we able to grasp the finite existence of a people in full.

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[199] Agamben 1998, pp. 19, 20.

[200] Agamben argues that 'the relation between membership and inclusion is ... marked by a fundamental lack of correspondence, such that inclusion always exceeds membership ... The exception expresses precisely this impossibility of a system's making inclusion coincide with membership by reducing all its parts to unity.' (Ibid., p. 25).

[201] Compare Ibid., p. 19: 'To refer to something, a rule must both presuppose and yet establish a relation with what is outside (the nonrelational). The relation of exception, thus, simply expresses the originary formal structure of the juridical relation.

[202] Lindahl (2008), p. 129.

4.9 Angst. Or Insecurity

An existential-ontological account of collective selfhood shows that the We, from the very moment of its inception, is exposed to the possibility of its own absence. The possibility of not-being is among the possibilities into which the We is thrown. The We, therefore, always already relates to its own end. Taking in an existential-ontological sense, death is the possibility of impossibility of every way of existing which 'offers no support for becoming intent on something, 'picturing' to oneself the actuality which is possible, and so forgetting its possibility.'[203] Death assures that the 'not yet' of all the We's identifications, representations and fixations does not result in the closure of an achievement, but continues to be the opening that it is. Its very finitude makes the We a *free* self, keeps it on the way of the and-so-forth.

But, this is not the whole story of the We's finitude, nor can it be.[204] The snag is that, even though death is a possibility of impossibility in the face of which the We is powerless, death (finitude), nevertheless, tells the We of its possibilities, and gives it the 'power of its finite freedom'.[205] Death (finitude) enables the We to be a self, informs the We that it is not fixed in its identity but, instead, exceeds itself as the 'projection of possibilities is, in each case, richer than the possession of them by the one projecting.' [206] In other words, the hitch is that death (finitude) still has *something* to say to the We, as its own not-being appears against the backdrop of what *enables* it to exist.

As Heidegger argues, however, in *Was ist Metaphysik?* (1929) for finitude to come about as finitude, the nothing must prevail without referring to, or being rooted in, something[207] (Dasein's possibilities). Death not only has to tell the We of its potentiality, it also has to convey the *nothing* holding sway over its existence. To exist as finite, the We must suffer from an impotence that does not convert into possibilities, but that, instead, resists its potentiality for being. It is here that *affective* understanding becomes of utmost importance. Indeed, if the We is thrown into the possibility of its own not- being, the relevant question is, of course, how this possibility is brought into experience. According to Heidegger, death is experienced in *Angst*. Angst, or insecurity, is the mood that accompanies Dasein's anticipation of its own end and that, moreover, brings Dasein's own powerlessness into experience.

Recall that in the We's everyday existence, its moods are not disturbing -- or at least, not really. Sure, times can be heated, feelings can run high, and the affections that cloak around public debate can be virulent. But as long as the We finds itself 'here' that it understands from the 'there' of its concerns, it is, at the end of the day, safe, reassured, confident, and so on. But all of this may not hide from view that the We's self-understanding takes the form of an anticipation that not only keeps

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[203] BT, p. 307.
[204] Cf., PM, p. 129.
[205] BT, p. 436.
[206] PM, p.128.
[207] Compare PM, p. 85: 'All the same, we shall try to ask about the nothing. What is the nothing? Our very first approach to this question has something unusual about it. In our asking, we posit the nothing in advance as something that 'is' such and such; we posit it as a being. But, that is exactly what it is distinguished from. Interrogating the nothing – asking what and how it, the nothing, is – turns what is interrogated into its opposite. The question deprives itself of its own object.'

the We on the way, but also disrupts it from within. For, the We's self-understanding never catches up with whatever it is with which it identifies. Fractured, unstable, marked by a constitutive 'not yet' that cannot be cleared away, the We falls apart and never coincides with its identity. Never fully present to itself, it is never a sure thing that the We is. The anticipation of its own absence – that, recall, already lingers within its concerns out of which it understands itself – is, therefore, a throwback upon itself. But this time the We cannot hide itself behind what it is doing, and comfort itself with its concerns. If, in its everyday concerns, the We projects itself as the ultimate for-the-sake-of which of its concerns, in the anticipation of its own absence, this very 'for-the-sake-of-which' begins to rumble. *Whatever* the We is, collapses, has *nothing* to say to it, whereas *that* it is, is all of the sudden put in question. No wonder, then, that the exposure to its own absence is not painless but, instead, comes with a radical sense of insecurity. Note that what causes this experience of insecurity is not something 'outside' the We. What is 'outside' does not induce insecurity because the world no longer has anything to say to the We. Rather, insecurity arises from within.[208] As Heidegger argues with respect to Dasein and death: 'In anticipating [zum] the indefinite certainty of death, Dasein opens itself to a constant *threat* arising out of its own *Da* […] Being-towards-death is essentially *Angst*.'[209] In Angst the nothing of Dasein's own end announces itself, and the nowhere presses. Angst, Heidegger describes, does not see a here or a there.[210] Angst, in a sense, is the experience of the loss of borders, and, hence, of the self. In Angst, Dasein is radically insecure.

If what is out-of-order obstructs us, frustrates our concern, spurring us to make it right again, in *Angst,* we wouldn't even know where to begin to make it right again, as there is *no where* from where to begin. In *Angst,* Dasein is lost in its world. It is, indeed, *no where*. Not the meaningful network of references and assignments is interrupted (and confirmed) by what is out-of-order or what is disorderly. Instead, our concern for and with order is suspended as a whole, throwing us as the ultimate for-the-sake-of-which into the abyss, while rendering conspicuous *that* we are.[211]

Insecurity is the We's experience of being lost within its world, of being absolutely nowhere. The We is lost in the twofold sense that it can no longer find

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[208] In *Communitas. The Origin and Destiny of Community,* Esposito argues, on the basis of the complex semantic of '*communitas*', that what human beings have in common and what subsequently constitutes community is their 'own proper lack' that interrupts every closure and that prevents them from finding a principle of identification around which they can unite themselves. The exposure to one's own proper lack, Esposito submits, pushes one 'into contact with what he is not, which his 'nothing", which, to be sure, 'is the most extreme of its possibilities, but also the riskiest of threats.' Esposito then continues the argument: 'Seen from this point of view, the community isn't only to be identified with the *res publica*, with the common 'thing', but rather, is the hole into which the common thing continually risks falling, a sort of landslide produced laterally and within … [I]t is *communitas* itself that causes the landslide.' (Esposito 2010, p. 8).

[209] BT, p. 310 (translation slightly altered).

[210] Cf., BT, p. 230.

[211] Compare BT, p. 231: 'Nothing which is ready-to-hand or present-at-hand within the world functions as that in the face of which anxiety is anxious. Here, the totality of involvements of the ready-to-hand and the present-at-hand discovered within the world is, as such, of no consequence; it collapses into itself; the world has the character of completely lacking significance. In anxiety, one does not encounter this thing or that thing which, as something threatening, must have an involvement. Accordingly, when something threatening brings itself close, anxiety does not 'see' any definite 'here' or 'yonder' from which it comes. That in the face of which one has anxiety is characterized by the fact that what threatens is *nowhere*.'

itself, can no longer understand itself from its concerns, and is, for that very reason, no longer able to relate to its place as its own place. This is not to say that everything the We is by virtue of its concern disappears. On the contrary, the problem is, rather, that it does not disappear, but insists while having nothing to say. Insecurity arises *because* what is normally so important, self-evident and familiar to the We, now stands before it in all its meaninglessness and idleness.[212] The We feels insecure, is ill at ease, not at home and uprooted *amidst* what is most familiar to it.[213]

When what is normally so important to us slips through our fingers, we are, no doubt, inclined to defend what is ours. Angst and insecurity surely trigger the reflex to insist on what we are, and defend it by all means necessary But Angst, recall, attunes Dasein's understanding from within, does not reveal or illuminate what Dasein really is, does not quite inform us what there is to defend. Rather, Angst reveals the *slipping away of the self*. In the preceding pages, I have shown that concern and everyday familiarity make Dasein feel at home in its world and enable it to express itself as a We. But if familiarity collapses, if there is no here and there to which things and persons are assigned, Dasein is, even though for the slightest moment, no longer able to say 'We.' Indeed, 'in Angst one feels uncanny' [*In der Angst ist es einem unheimlich*].' [214] In *Was ist Metaphysik?,* Heidegger perceptively describes what happens in Angst: 'We 'hover' in Angst. More precisely, Angst leaves us hanging, because it induces the slipping away of beings as a whole. This implies that we ourselves … in the midst of beings slip away from ourselves. At bottom therefore it is not as though 'you' or 'I' feel uncanny; rather, it is this way for some 'one.' In the altogether unsettling experience of this hovering where there is nothing to hold onto, pure Da-sein is all that is still there. Angst robs us of speech. Because beings as a whole slip away, so that precisely the nothing crowds around, all utterance of the 'is' falls silent in the face of the nothing.'[215]

So the We's proper understanding that arises from within, fundamentally *disowns* it. This disowning shows that the throwback upon the self involved in the riskiest of possibilities (death, the end) is a throwback all the way down the origin. Angst links the nothingness of the end to the nothingness of the origin. 'The pure 'that it is", Heidegger writes, 'shows itself, but the whence and 'whither' remain in darkness.'[216] Proper understanding, that comes along with a sense of insecurity, does not draw on a principle of identification around which the polity can unify, nor does it reveal an origin or a true self. Rather, insecurity is the experience of facticity. As the We falls silent, insecurity reminds it that the first word, the first decision, does not belong to it. Indeed, recall that facticity denotes that 'Dasein has been thrown; it has been brought into its *Da*, but not of its own accord. As being, it is determined as potentiality-for-being that belongs to its self even though it did not give its self beforehand.'[217] But if the We is opened to its self and its world on

[212] Compare PM, p. 88: 'All things and we ourselves sink into indifference. This, however, not in the sense of mere disappearance. Rather, in their very receding, things turn towards us. The receding of beings as a whole, closing in on us in Angst, oppresses us. We can get no hold on things.'
[213] Cf., BT, p. 321.
[214] BT, p. 233/SZ, p. 188.
[215] PM, pp. 88, 89.
[216] BT, p. 173.
[217] BT, pp. 329, 330 (translation altered).

account of its facticity, this implies that its existence which, to be sure, it does not owe to itself, is marked by an original impropriety.[218] Insecurity brings the We before its facticity, reveals that it is a self by virtue of being delivered over to possibilities out of which it understands its self. But, it also reveals that what enables the We to be a self and exist in the mode of the possible is, at the same time, what escapes its possibilities, what resists its potentiality-for-being. Put more strongly: What enables the We to exist as a self, and gives it the power of its finite freedom, is the *powerlessness* of being delivered over to itself.[219] What escapes Dasein's projections into thrown possibilities by virtue of which it is a self is *that* Dasein is a self by virtue of the possibilities to which it is delivered over. Facticity enables the We to be. At the same time, it renders the We irreparably powerless. Indeed, in *The Essence of Ground,* facticity is revealed as Dasein's impotence: 'Dasein … is, as *free* potentiality, *thrown* among beings. The fact *that* it has the possibility of being a self, and has this possibility factically in keeping with its freedom in each case … does not stand in the power of this freedom itself. Yet, such impotence (thrownness) is not first the result of beings forcing themselves upon Dasein, but rather, determines Dasein's being, as such.'[220] Angst, or insecurity, in short, exposes the We to the 'powerlessness of abandonment.'[221]

The ontology of selfhood, as I have elaborated in this chapter, frames the sovereign's concern for its own being. This concern came into view as a care for, and the power to be, a self. The power to be a self has little to do with a blown-up identity, arrogance, or selfishness, and even less with the violence of impatience, with which we insist upon ourselves, and defend what is ours. On the contrary, a people's concern for its own being demands that the power to be a self be weighted in the light of the background possibility of the not-being, which is always the people's own possibility. Because the nothing holds sway over its existence, the people determines itself in modesty and diffidence. Indeed, if being a self is about *how* a people relates to its identity, and if this relation 'makes' the self, we should not, Agamben says 'treat existence as a property', but instead, 'think of it as a *habitus*, an *ethos*.'[222] *Ethos*, as Heidegger reminds us in *Über den Humanismus*, is the dwelling place of human being from where he relates to itself, and is open to what arrives unexpectedly.[223] What is unexpected is precisely what is not here nor there but, instead, comes from elsewhere. And, instead of violently repressing it, intercepting it and diverting it, *ethos* requires that we experience our own not-being; experience, that is, that our place is never entirely our *own* place. 'Fleeing our own impotence', as Agamben beautifully says, 'or rather trying to adopt it as a weapon, we construct the malevolent power that oppresses those who show us their weakness.'[224]

The next chapter argues that the arrival of the refugee is unexpected in the above sense, as the refugee is not yet here, but neither belongs there. Instead, he is

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[218] Cf., Agamben 1999, p. 197.
[219] Cf. BT, p. 436.
[220] PM, p. 134, 135.
[221] BT, p. 436.
[222] Agamben, G. *The Coming Community*, Minneapolis/London: University of Minnesota Press 1993, p. 29.
[223] Compare Wegmarken p. 357: *êthos anthropoi daimôn*, sagt Heraklit selbst: 'Der (geheure) Aufenthalt ist dem Menschen das Offene für die Anwesung des Gottes (des Un-geheuren).'
[224] Agamben 1993, p. 32.

nowhere, which is exactly why he claims asylum. To cast his arrival as illegal, and to deflect or refuse him for that very reason, is to misinterpret what is at stake. The challenge inherent in the arrival of the refugee does, indeed, induce insecurity, but, not because the refugee would be out-of-joint here or be misplaced. The refugee, it will be argued, exposes a polity to its own facticity. Facticity puts doubt on a people's *right* to determine itself. Indeed, if the first word, the first decision isn't ours, whence this right? And, whence the right to reign over the borders that separate an inside from an outside? Whence the right, indeed, to select and exclude non-nationals at the borders of a polity? The next chapter elaborates these questions, and draws the implications of facticity with respect to the right to (seek) asylum, arguing that a people's concern for its own being makes it care for those who belong nowhere and claim a right to have rights.

5

Asylum

What makes a people sovereign is the concern for its own existence. The ontology of selfhood as elaborated in the previous chapter has sought to make this concern intelligible. Concern, it was argued, enables us to determine and declare ourselves as 'We, the people'. Joint concern, in short, enables us to exist as a plural self. At the same time, however, concern renders us irreparably powerless. Indeed, the ontology of selfhood demonstrates that every determination of the self is ridden with elusiveness, signaling the possibility of the absence of the self. So, if we, as a polity, remain concerned for our own being, it is because the self incessantly slips away, eludes the very concern by means of which we determine ourselves. Therefore, whenever we determine ourselves we not only relate to possibilities we did not choose and which have been repressed and marginalized, but we are also always exposed to the innermost possibility of our not-being. Hence the finitude of the We not only signals that this We remains forever cut off from what was once possible, but also, and above all, highlights its own impotence in the face of potentiality.

What does this ontology of selfhood and finitude imply for the right a democratic We claims to manage and control its borders with a view to securing the inside of democratic legal order? Does this altered ontology provide us the cues to rethink the right to seek asylum which, of necessity, entails the unauthorized border crossing of the potential refugee? Does our own finite existence, our own (im)potentiality cast light upon the content and meaning of a right to (seek) asylum?

This chapter first argues that the concern for one's own being decisively changes the meaning of the well-known paradox of sovereignty, according to which the sovereign is at the same time both inside and outside the legal order. This is to explain, secondly, why the right to have rights, which is neither politically nor morally grounded, exposes a polity to its own facticity, revealing its fragile and vulnerable existential collective self-care. As the right to have rights plays on our own facticity, it certainly is a limit concept. Indeed, as will be argued, the right to have rights translates, first and foremost, as the right to seek asylum. But as will be subsequently argued, the right to have rights cannot be limited to the right to *seek*

asylum. As the right to have rights only makes sense within the context of displacement, it illuminates exactly what the refugee is asking for in claiming asylum. As it is the right of those who belong nowhere, it highlights that the refugee in claiming asylum claims a place of his or her own where he or she can be at home again. It will, therefore, be argued that the right to seek asylum does not exhaust the concept of asylum. The final sections of this chapter will show the relevance of the argument developed within the concrete practice of asylum policy and legislation.

5.1 The Abyss of Sovereignty

This section links up with the exposition of the self as given in the preceding chapter, and draws the consequences thereof with respect to sovereignty. Recall that concern makes our world familiar as it is geared towards order. Our world is familiar as things and persons are where they are supposed to be, informing our expectations that direct our actions. Concern assures that business will always be business as usual. Of course, things can be out of joint, appear in places where they do not belong or don't do the job they are supposed to do. But something can only be out of place or misplaced against the backdrop of the place assigned to it. Therefore, concern, it was argued, thrives on a binary logic, as it sets the boundaries between places where things and persons ought or ought not to be. Within order, things are either emplaced or misplaced. Indeed, concern came into view as the everyday ordering of space, by assigning a place to things and persons suitable to each. Concern, in short, is what gives and ensures order. Being reassured and feeling secure is the mood, so to speak, of our everyday and normal existence. Our joint concern is, therefore, nothing other than the first appearance of the sovereign reigning over the boundaries that separate an inside from an outside so as to secure that very inside as a familiar place in which we can move around freely.

Also, recall that the We establishes itself by virtue of its concern. More precisely still: The We understands and determines itself by means of this ordering of space, as it projects itself as the ultimate-for-the-sake-of-which of its concern. In *The Essence of Ground* Heidegger coins this determining or establishing [*Stiften*] as the 'first' sense of grounding: 'This 'first' form of grounding is nothing other than *the projection of the 'for the sake of'*.'[1] This 'first' form of grounding, Heidegger says, is coeval with grounding in the sense of taking up a place or 'gaining ground' [*Bodennehmen*]. Grounding, as establishing oneself by means of circumscribing oneself to a place, constitutes and guarantees the We's freedom. It is, in fact, what makes sovereignty a sustained concern. The polity cannot be concerned for its own being, i.e., it cannot act as a sovereign without ground(-ing) in this primary sense.[2]

But does not sovereignty, thus understood, i.e., as the concern for our own being by virtue of which we determine ourselves and take the land, ultimately give the leeway to violence? Is violence not the realm to which we would resort in order

[1] PM, p. 217.

[2] Compare Lindahl (2004), p. 656: 'Taking up a relation to an own place necessarily engages a community in a relation to *itself;* conversely, no relation of a community to itself--hence no community--is possible unless mediated by the claim to an own place.'

to repress what is unfamiliar and what falls beyond the ambit of our concern? To deflect what is out of place and has no right to be here? Does not sovereignty as concern undergird the right to defend what is ours by all means necessary? Does not, in other words, the sovereign concern for our own being culminate in the infamous paradox of sovereignty in which the sovereign is both inside and outside the law on account of having the power to suspend the law in order to avert what is threatening, opening the space in which violence can derail[3]?

Arguably, it does not. For, joint concern puts what is most our own and what properly belongs to us into a wholly different perspective. Indeed, grasping the We as a self, constitutes the passage from a sovereign control and dominion that violently acts on emergencies, to a sovereign care for and holding sway over what is in need of ordering. Grasping the We as a self makes the We appear as inherently and existentially insecure, and spaces out an openness for the outside.

Consider, once again, the 'first' form of grounding in which the We understands and determines itself as the ultimate aim of its concern and order. The snag is, of course, that this 'first' form of grounding does not precede the polity, but comes after. As argued both in Chapter Three and Chapter Four, the We does not establish itself as a sudden burst outside of time. Rather, it draws on what has already been established as meaningful. This is why self-understanding takes the form of a projection: The We projects itself into the possibilities into which it is thrown, it mirrors itself in and identifies with what already appears as meaningful. To determine oneself as a polity, to exist as a self in common, means: to jointly make one's own what is given. We do not claim what is given and turn it into an irrefutable fact. It is, rather, the other way around: We are claimed by what is given, and we try to make sense of it.

The sovereign act of self-determination thus draws on facticity and circularity. Facticity and circularity explain why self-determination does not result in the closure of an achievement but, rather, constitutes the openness which being a self amounts to. For it is on account of our facticity that we can only anticipate ourselves without ever having the possibility of catching up. The We anticipates itself by way of identifying itself with what it is not (yet). We are familiar with the following example: The Maastricht Treaty, which established the European Union, claimed a future (anticipatory projection) by way of referring back to a past (Europe, thrown possibility) which gradually acquires its relevant sense and meaning with this very projection, representation and identification.

As the sovereign act of self-determination is imbued with circularity, it is implied that the self is not some sort of term that is prior to the relation to the We. Rather, the self rises forth from this anticipatory projection, is engendered by the exposure to its qualities. The sovereign We is exactly the being of which Agamben, in the *Coming Community,* says that it 'does not remain below itself … does not *presuppose* itself as a hidden essence that chance or destiny would then condemn to the torment of qualifications, but rather exposes itself in its qualifications …'[4] That the self is not the presupposition of reflexive identity but, rather, rises forth from reflexivity, is another way of saying that the self is not the ground of sovereignty. So, even though self-determination is the 'first' form of founding that constitutes

[3] The paradox of sovereignty was briefly discussed in Chapter Three, section 3.7.1.
[4] Agamben 1993, p. 28.

our freedom, the self is not the ground of it: 'As *this* ground, however, freedom is the abyss [*Ab-grund*] of Dasein.'[5] Put differently, even though the self is the 'ground' of order, it 'can never get that ground in its power.'[6]

The collective self which is the essential mark of sovereignty thus signals the fundamental lack of ground of order. This is not to say, it should be clear, that the We is without identity, that no qualities can be ascribed to it. The point of the matter is, rather, that the We is not a subject *on whose ground* an identity can be ascribed. In this respect, it should not have come as a surprise that the European Union, in preparation of a European Constitution, when trying to pinpoint its identity in terms of properties under the Convention chaired by Giscard d'Estaingit, sadly failed. The We (the European Union) understands itself by assuming an image it is not yet (a future Europe) and that is not exclusively its own (other constituencies, to be sure, can claim a different future for Europe). As the We anticipates itself, there always remains a hiatus between itself and the identity it claims and adopts. Every projection, representation and identification comes too early, and the self, which comes after, is always lagging behind, and, ultimately, lacking. Every representation, every identification is, therefore, ridden with this lack of presence of the We to itself, is ridden, that is, with the We's own absence. Absence or not-being inheres in the We as a fundamental possibility as long as it exists, and from the very moment it started to live as a people. And because of that the We can never get itself within its own power, which is precisely why it is concerned for its own being. Put differently: To be concerned for its own being means that the relation of the We to its identity is never settled but is, rather, as Nancy would say, infinite. Nancy, thus, argues that sovereignty essentially eludes the sovereign -- and this very elusion is what makes us sovereign, enables us to exist as sovereign.[7]

Where does this *leave us*? How does the elusion of the self affect the polity's concern as the ordering of space by virtue of which the We determines itself? What it means is this: Even though the We is the ultimate aim of concern and order, it is itself never wholly included within the meaningful whole of assignments and references that make up order. As the self is what eludes at the moment it is articulated, the We is itself always, to some extent, excepted from the distribution of places for which it is concerned and by means of which it determines itself. To be very specific, each and every polity, whether national, supra-national or infra-national, acknowledges that its borders are a concern, not only in the sense that they are probed from outside, but also, and more importantly, that they are questionable from the inside. That is, it is never entirely sure where they are. For instance, not too long ago, even Italy did not consider Lampedusa as its cape, while at the time of this writing the whole of Europe does so now. Or, states remain deeply divided over where their fishing grounds begin and end, not to mention their claims to air space, or to oil fields. Emplacing itself [*Bodemnehmen*], taking up a place as its own, the We is always already displaced. It can never, once and for all, take up a place. It can never, that is, take the land and be fixed and rooted in place.

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[5] PM, p. 134.

[6] BT, p. 330 (translation slightly altered).

[7] Compare Nancy 2007, p.103: 'Sovereignty essentially eludes the sovereign. If sovereignty did not elude it, the sovereign would in no way be sovereign.'

To the We's own being for which it is concerned, no definite place can be assigned.[8] Indeed, if, as argued in Chapter Four, the We can be said to be *Unheimlich* in the experience of insecurity, it is because it is itself excepted from order, and is never fully at home within its own place.

It is important to stress that the We's displacement does not equal the refugee's displacement. Whereas the We's displacement is bound up with its very emplacement by way of which it establishes itself and expresses itself as a We, the refugee, recall, is the one who can no longer say 'We.' And whereas the latter's displacement signals that there is no place the refugee can call its own, the We, by contrast, is displaced within its own place.

So the relevance of the ontology of selfhood for the question of the refugee, and the issue of asylum, is not that 'we are all refugees.' The crux is different. The corollary of the We's displacement, i.e., of the fact that the We is itself excepted from what it orders, is that the We is both within and without order. Therefore, what the altered ontology of selfhood implies for popular sovereignty is this: In the very moment of self-determination and self-ordering which comes about as the finite moment of identification and fixation in the endless exposure to its qualities, the self cannot but slip away, disappear from the stage, so to speak, and make the We move outside itself. Taking my cue from Van Roermund, this decisively alters the meaning of the paradox of sovereignty. As Van Roermund rephrases the paradox: 'There is nothing outside the law – say 'we', who are all outside the law.'[9]

This rephrasing of the paradox fully brings to light what it means for a We to exist finite. For, that We are outside the law implies that the position from where the law is made is itself never fully law-made. The paradox of sovereignty, therefore, points to our facticity as a people, reminding us that we are forsaken and left to ourselves, delivered over to the world in which we find ourselves. It reminds us, that is, that the first decision in the sense of an initial once and for all decision isn't ours. Finitude, as said, enables us to exist as a self. But it also renders us powerless with respect to the fact that we are delivered over. In his reflections on sovereignty from the viewpoint of the self, Nancy demonstrates the power and powerlessness of a sovereign people: 'The same condition that ensures that sovereignty receive its concept, also deprives it of its power: that is, the absence of superior or foundational authority … In a rigorous sense, the sovereign foundation is infinite, or rather, sovereignty is never founded. It would, rather, be defined by the absence of foundation or presupposition.'[10]

The refugee, who is neither inside nor outside, is the inverted image of the people who is both inside and outside at the same time. Recall from Chapter Three that the right to have rights reflects the inevitable asymmetry between the refugee and the receiving state. This asymmetry, it was argued, precludes the possibility of a political reciprocity on the basis of which asylum can be claimed, and causes the appeal to a moral universalism to be of little avail to the refugee. The asymmetry reflects, in a way, that the refugee has no *right* to be here.

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[8] So, Dasein takes up a place of its own, - and is bound to lose it again. This is how Heidegger, in *Introduction to Metaphysics,* reads the first choral ode of Sophocles' *Antigone.* Cf., IM, p. 157. As to the impossibility of definitely rooting Dasein into place see also Lacoue-Labarthe 1997, pp. 55-86.

[9] Van Roermund (2006), p. 540.

[10] Nancy 2007, p. 103.

5.2 The Right to Seek Asylum

This section argues that the unexpected arrival of refugees drags our own facticity out of inconspicuousness. The experience of facticity is a limit experience that highlights our own impotence with respect to our own being. Indeed, as will be argued, the refugee calls into question the *right* to determine ourselves, as he brings to awareness that our existence relies upon something we cannot appropriate. As the unexpected arrival brings our own limit into view, I will argue that the right to have rights is a limit concept, as well, and, therefore, first translates as the right to seek asylum.

In this respect, it is important to keep in mind that (1) the right to have rights attaches to those who belong nowhere and (2) that it displays the unavoidable asymmetry between the refugee and the receiving polity. The right to have rights, therefore, reflects that the refugee is neither inside (hence the asymmetry) nor outside (he belongs nowhere). Otherwise still, upon his arrival, the refugee cannot be immediately incorporated inside (he has *no right* to be here), nor can he be properly located outside (he has *no* where to go). If, therefore, the right to have rights is to make sense, it is because it translates as the right to seek asylum. To grant a right to seek asylum is precisely to acknowledge that the refugee cannot be ignored and diverted back (the prohibition of *refoulement*) and to suspend the decision, whether or not he has a right to be here. It is to acknowledge, in other words, that the refugee's physical presence upon the territory does not in itself give rise to a legal right to be within which, however, does not imply that he has no right to be here. Therefore, to grant a right to seek asylum reflects, again, that the refugee is neither inside nor outside.

Neither inside nor outside, the refugee does not, properly speaking, arrive at the borders of a state that close off a polity and limit an inside over against an outside. Rather, the refugee appears at the threshold, which is exactly the place where the inside and outside of the polity intertwine. Even if this threshold is transformed into a geometrical line without width by virtue of a legal order, the political concept of a border remains this threshold, and, when push comes to shove, law reverts to it. At the threshold, the separation of what belongs inside and what outside becomes possible, but the threshold itself is excepted from this binary opposition. Rather, the threshold is the outside that intimately belongs to the inside and, therefore, intimates an outside in a heightened sense. Here is how Agamben understands the threshold: 'It is important to note that the notion of the "outside" is expressed in many European languages by a word that means "at the door" (*fores* in Latin is the door of the house, *thyraten* in Greek literally means "at the threshold") … The threshold is not, in this sense, another thing with respect to the limit; it is, so to speak, the experience of the limit itself, the experience of being-*within* an outside.'[11]

Being-within an outside is precisely the ambiguous experience of being a self. The self, as the essential marks of sovereignty, recall, marks that the We is never wholly within, but also always without order. Importantly, the We's outside is irreducible. 'The outside', Agamben says, 'is not another space that resides beyond

[11] Agamben 1993, p. 68.

a determinate space.' The outside is much more like the abyss. The experience of being-within an outside is, therefore, the experience of a groundless being.

It is in this irreducible outside that we meet, so to speak. The refugee is the mirror image of the polity's own being-within an outside, as he suffers from the desperate experience of being-without an inside. This signals that the refugee cannot be pushed back beyond the border, as his outside cannot be reduced to a determined and qualified 'there', that is, a foreign state where he supposedly belongs. That is, of course, exactly why he claims asylum. The claim to asylum plays on a people's own ambiguous self. The groundlessness of the people's own being, which puts doubt on the right to determine itself and control its borders, makes the people concerned for the one who has no right to be here, but who *is* suddenly here. Hence, if the We approaches him with benevolence and in good faith, it is the We's own precarious being that attunes it to these moods of modesty. Malevolence, distrust and hostility, by contrast, erase the We's own ambiguous self by turning the threshold into a frontier. I will return to that below.

All of this is not just a matter of good taste and manners. What is at issue is thoroughly political. Indeed, the right to seek asylum does not simply constitute a humanitarian exception to a sovereign rule, as is commonly assumed. What is at stake is much more fundamental than that.[12] For the refugee exposes us to our facticity, makes our groundlessness appear, even if only for the slightest moment. The refugee, who has lost a place of his own, knows better than anyone else, so to speak, that the enjoyment of freedom and rights requires spatial limitation. The refugee does not, therefore, reproach the receiving polity for its 'original sin' of drawing boundaries. But that boundaries need to be drawn so as to assign to each its due does not justify these boundaries in terms of law. Therefore, what the refugee does call into question is the *right* a polity claims to control its borders with a view to preserve the inside and secure it as its own place. Still otherwise, the refugee exposes that a people's concern for its own being by virtue of which it determines itself is much more *de facto* than it is *de jure*. And if the refugee's arrival is experienced to be threatening, if it makes a polity insecure, it is because his arrival reveals that self-concern draws on something the people can never fully make its own and that can never be fully brought into the fold of law. It is for this very reason, as Van Roermund argues, that the people while '[c]omitting its original sin (self-delineation) as it must do … may hold back from its most drastic implications.'[13]

Standing at the threshold, the refugee reveals that the inside/outside divide cannot be perfectly mapped onto the difference between a here and a there, is not exhausted by the separation of the own from the foreign, and cannot be reduced to the binary opposition between the legal and illegal. The refugee challenges the inside/outside divide, as his arrival is, strictly speaking, not legal. We did not grant him permission to enter our territory (or jurisdiction). He crossed our border without our prior consent. Though not legal, neither can his arrival be cast as illegal, precisely, insofar as he claims asylum. Neither simply legal nor fully illegal, his arrival and physical presence upon the territory is, rather, *a-legal*. According to

[12] To develop this argument, I greatly benefited from Hans Lindahl's fundamental inquiry into the spatiality of law and reflexive identity which he elaborated within the context of immigration.
[13] Van Roermund (2006), p. 536.

Lindahl, a-legal acts or behavior do not fall tidily on either side of the terms of the binary opposition between the legal and illegal. 'Spatially speaking', he argues, 'a-legality manifests itself in forms of behavior that intimate a place that has no place within the distribution of legal places a collective calls its own, yet ought to, in some way.' [14] A-legal acts or a-legal behavior, therefore, challenge the inside/outside divide as it calls for an ordering anew of the polity, i.e., for a redistribution of places so that a place is made available for what is currently not included. Among the many examples put forward by Lindahl is the example of a group of homeless persons who occupy a privately- owned apartment. Though they entered illegally and occupied the building, their act is not simply an illegal act of trespassing. It can also be constructed as a demand that the government alleviate their plight, 'inveighing against the established distinction between legality and illegality as concerns who ought to be where. In particular, their transgression of a spatial boundary renders conspicuous a distribution of places as a region that makes no place for them – although it ought to, in some way.'[15] By engaging in what can be constructed as a-legal behavior, and hence as contestation, the group of homeless persons expose the *contingency* of the current distribution of places that make up order, challenging that the We is the ultimate- for- the- sake- of- which of order and concern, as they are excluded from the We. The group of homeless persons, therefore, intimate the possibility of *Another We*. Indeed, according to Lindahl, a-legal behavior plays on the tensions between the actual and possible: 'These examples of a-legality bring into play, additionally, the tension between law as an *actual* or posited distribution of ought places, and *possible* law – an alternative ordering of legal space. A-legality marks the experience in which possibility, in the form of alternative ways of drawing legal boundaries, announces itself to a collective. Precisely to the extent that it succeeds in intimating a place as a possible *ought*-place, a-legality depletes, as it were, the 'ought'-character of a posited distribution of legal places, revealing this distribution as contingent.'[16]

A-legality, as said, serves as a good name to capture the unexpected arrival of the refugee. But the depletion involved therewith is more excessive, so to speak, than revealing the contingency that brings into experience that the Self at issue in sovereign self-determination is never fixed but always remains within the realm of the possible. The challenge and intrusion inherent in the arrival of the refugee also brings into experience that the possibility of our existence as a people is intimately bound up with the possibility of our being-without-possibilities, i.e., our not-being at all. The arrival of the refugee, I submit, reveals a second manifestation of a-legality that plays on the tension between being a Self, and the elusion of the Self, between being and not-being, between the possible and impossible. Indeed, the fundamental lack of ground of order, the abyss, not only, as Lindahl argues, 'renders possible all forms of legal openness and closure',[17] but also exposes us to our own absence, the contingency of our own (not) being.

The arrival of the refugee, for whom the absence of a We is a living reality, reminds the polity of the possibility of not-being which is also always its own

[14] Lindahl (2010), p. 31.
[15] Ibid., p. 41.
[16] Ibid., p. 43.
[17] Ibid., p. 56.

possibility. The refugee, by claiming asylum – which, according to Rigsby signifies the absence of legal and political order[18] -- reminds us of our own absence as a polity. He or she exposes the We to its own facticity and groundlessness, revealing what Michelman calls 'our own precariously existential collective self-care.'[19] This is the care, as Nancy argues with respect to sovereignty, 'of that which carries in itself, of necessity, its own emptying.'[20] By granting asylum we respond to this necessity of our own emptying. Asylum, I submit, is the institution of the awareness of our own groundlessness and nothingness.

Therefore, there always comes a moment, however short, when we experience our own impotence in the face of the arrival of the refugee. And if we abstain from pushing him back, if we refrain from repression and violence, it is because we know that violence is only our inability to face our own impotence. And so we empty ourselves, experience our own powerlessness, dwell in the groundlessness of our facticity. We do not insist upon anything, least of all upon ourselves, because there is nothing to insist on. The arrival of the refugee makes us 'pause and be humble' and thus we respond with diffidence.

At the threshold, there is no law to enforce, - which is why the refugee is not penalized for his illegal entry. At the threshold, we do not exercise our right to include and exclude, - so, without imposing any requirements, without asking for any proof, the prohibition of *refoulement* enters into force as soon as asylum is claimed, or even if we suspect a person to be in need of protection without any declaration on his part that he does. At the threshold, we lack the power to demand anything, - and, therefore, access to the asylum procedure is granted without subjecting the refugee to requirements that have to be fulfilled prior to lodging an asylum claim, without a summary hearing which would decide whether or not a person is entitled to claim asylum in the first place.

Indeed, non-penalization of illegal entry (article 31 Refugee Convention), *non-refoulement* (article 33 Refugee Convention), and access to the asylum procedure are the key elements in the right to seek asylum. From a legal point of view, these basic elements follow from the fact that recognition of refugee status is considered to be a declaratory act, as is stipulated in UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status.* Consideration 28 of Part One reads: 'A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.' This implies, first of all, that certain provisions and rights of the Refugee Convention have to be respected, not just *upon* recognition, but *until* a negative decision has been made.[21] Secondly, and most importantly, as conferral of refugee status is

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[18] Rigsby, *Asylia. Territorial Inviolability in the Hellenistic World*, Berkeley: University of California Press 1996, p. 10.

[19] Michelman (1996), p. 207.

[20] Nancy 2007, p. 107.

[21] Compare Hathaway 2005 p. 278: '[Since] refugee rights are defined to inhere by virtue of refugee status alone, they must be respected by state parties until and unless a negative determination of the refugee's claim to protection is rendered. This is because refugee status under the Convention arises from the nature of one's predicament, rather than from a formal determination of status.' At page 279, Hathaway enumerates the

considered to be a declaratory act on the basis of the refugee's predicament, a thorough examination of the refugee's individual situation is required. In other words, good decision- making in good faith on the merits of *every* asylum claim is required.[22] Non-penalization and *non-refoulement,* as well as decision making on the merits of the asylum claim, testify to a benevolence and good faith vis-à-vis the potential refugee. Indeed, with benevolence and good faith we respond to those who have *no right* to be here and who, thereby, reflect our own facticity. And this saves the right to have rights from the cynicism to which the lack of a moral and political ground would otherwise condemn it.

However, from a political point of view, the right to have rights cannot be limited to the right to seek asylum. Above all, it goes to the claim that asylum is a claim to an own place at the behest of those who have been deprived of a place in this world. While the next section will unfold this idea in full, the present section purported to explain why such a claim can register at all in the polity; it registers because of the polity's concern for its boundaries which become elusive in the very act they are set, and the abyss of not-being that is its ultimate perspective.

5.3 A Right to Asylum

The right to have rights not only translates as the right to *seek* asylum but also casts light on what the refugee is claiming in claiming asylum. With respect to asylum beyond the right to *seek* asylum, it is worth noting that in the past decade, international legal instruments established a *right to asylum*. In consideration 10 of its recital, the EU Qualification Directive (2004/83/EC) claims to 'ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.' Additionally, in its article 18, the Charter of Fundamental Rights of the European Union stipulates a right to asylum.

The inclusion of a right to asylum is generally considered to be a decisive turning point in refugee law, as it meets the criticism, as old as the 1951 Convention, that failures in refugee protection are due to the lack of an individual right to asylum. This lack is rooted in the longstanding tradition of asylum which, instead of being a claim-right of the individual, pertained to power-right of states to grant asylum to those aliens whom it refused to extradite at the request of their state of origin.[23] The right to asylum thus corresponded to a rightful refusal of extradition[24] and was based on the consideration that to extradite an individual to a

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rights that have to be respected, independent from formal recognition, including the right to be protected against *refoulement*.

[22] Cf. Guild (2006) p. 650.

[23] One of the oldest testimonies of a state declaring to another state that it refuses to extradite its nationals can be traced to the 14th Century BC. In a treaty between Muwattalisch and Alakschadusch, we read: 'Betreffs eines Flüchtlings aber habe ich folgendes unter Eid gelegt: Wenn ein Flüchtling aus deinem Land ins Land Hatti kommt, so gibt man ihn dir nicht zurück; aus dem Lande Hatti einen Flüchtling zurückzugeben ist nicht Rechtens.'(Cited in: Kimminich, O. *Asylrecht,* Berlin: Luchterhand, 1968, p. 11.

[24] The close connection between asylum and extradition was echoed in the 1977 (unsuccessful) Conference on Territorial Asylum. As is evidenced by the draft text of the Convention on Territorial Asylum, asylum is not necessarily limited to refugees. As a matter of fact, the participants to the 1977 Conference expressed the hope that the Convention, if adopted, would *also* apply to refugees. Cf. Grahl-Madsen, A. *Territorial Asylum*, Stockholm/London: Almqvist &Wiksell International 1980, p. 63 and p. 83.

state who wants him back for punishment runs counter to natural feelings of morality and humanity.[25] As the right to asylum could not be claimed by an individual or enforced upon his request, it qualifies as an imperfect right by means of which states seek to do justice to the moral demands of humanity, but are in no way obliged to do so.[26]

Though the criticism that the right to asylum pertains to states, not individuals, appears to be somewhat outdated,[27] it was still echoed in the critique that there was no right to asylum, as it remained within state discretion to grant asylum. States *may* grant asylum upon refugee recognition, but were not obliged to do so. What constituted a great difficulty in refugee law until recently was that, even though the right to seek asylum was considered to be a universal human right according to article 14 of the Universal Declaration of Human Rights,[28] there consisted no corresponding duty on states to actually grant asylum. Absent this duty, asylum for a long period of time remained within state discretion.

With the inclusion of a right to asylum in EU legislation which, for the first time in history, established an individual right to asylum, asylum is no longer a matter of state discretion. Articles 13 and 18 of the EU Qualification Directive stipulate, respectively, that EU member states *shall* grant refugee status and subsidiary protection status to persons in need of international protection.

However, the averment with respect to a right to asylum as recently expressed, can only be properly weighed if there is clarity on the terms involved. The question to be asked, therefore, is what asylum means and what it entails. Strikingly, there is a persistent propensity to equate asylum to protection. Insofar as the international refugee protection regime responds to the situation that befalls refugees upon fleeing, and which is characterized by the lack of state protection, it is only fair to assume – or so it seems – that the refugee, in claiming asylum, is seeking protection. Additionally, protection is further understood to be protection against *refoulement*. Indeed, the prohibition of *refoulement* appears to be so fundamental for refugee protection that it is generally considered to be the corner stone of the refugee protection system. In its *Introductory Note* added to the 1951 Convention in 2006, UNHCR, therefore, explicates: 'Certain provisions of the Convention are considered so fundamental that no reservations may be made to them. These include the definition of the term "refugee," and the so- called principle of *non-refoulement*, i.e., that no contracting state shall expel or return ("*refouler*") a refugee against his or her will, in any manner whatsoever, to a territory where he or she fears persecution.'[29] Castillo and Hathaway lay bare the political ground for this limitation of protection to *non-refoulement*: 'While willing to provide protection against return to persecution, states insisted that they be allowed to decide who should be admitted to their territory, who should be allowed to remain there, and

[25] Cf., Kimminich 1968, p. 15.
[26] In general see Cavallar, G. *The Rights of Strangers. Theories of International Hospitality, the Global Community and Political Justice since Vittori,* Ashgate: Aldershot 2002.
[27] Cf., Grahl-Madsen 1980, p. 2.
[28] Grahl-Madsen explains that the inclusion of a right to seek asylum in the Universal Declaration was considered to be perilous. After all, The Universal Declaration envisioned an ideal for all the members of the human community that would be undermined by the existence of persecution. To include a right to seek asylum would be to admit that this ideal world was not conceivable. Cf., Grahl-Madsen, A. *Territorial Asylum*, Almqvist &Wiksell International, Stockholm/London, 1980, p. vii.
[29] Available at http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf.

ultimately, who should be permanently resettled. This position, argued as a necessary incident of sovereignty, is at the root of the failure to include any duty to grant asylum, either in the Refugee Convention, or its companion 1967 Protocol.'[30] Admittedly, the etymology of the word apparently legitimizes the restriction to protection against *refoulement,* as asylum means 'sacred and inviolable, 'freedom from seizure.'[31] Indeed, in the previous section, reference was made to Rigsby, who argues that asylum is a negative adjective denoting the absence of legal and political order.

In this respect, Arendt's observation with respect to the spatiality of law, politics and worldliness becomes relevant. According to her, the absence of legal and political order is tantamount to the absence of a world. As she considers in *Was ist Politik?*: 'Jedes Gesetz schafft vorerst einen Raum, in dem es gilt, und dieser Raum ist die Welt, in der wir uns in Freiheit bewegen können. Was Auβerhalb dieses Raum ist, ist ohne Gesetz und genau gesprochen ohne Welt.'[32] To limit asylum to *non-refoulement* is virtually to deny the refugee a place of his own where he can appear and inhabit a world. If asylum is nothing else than mere protection, the possibility of a positive aspect to asylum that would enable refugees to continue their lives would be precluded.

To be sure, protection against *refoulement* is certainly the first exigency to be met when it comes to the protection of refugees. But, it would be wholly reductive to limit asylum *in toto* to *non-refoulement*. Mere protection against *non-refoulement* is by no means capable of protecting against the idleness of being excluded from the enjoyment of basic human rights. Indeed, should asylum be limited to this, the protection offered would ultimately boil down to securing the physical safety of the refugee and providing emergency humanitarian assistance. This is no wild guess, as is evidenced by UNHCR's statement on the cover of *Refugee Magazine,* on the occasion of the 50th anniversary of the Refugee Convention. To celebrate, UNHCR apparently wanted to explain the meaning and purpose of the Convention, adopting the slogan: *The Wall Behind which Refugees can Shelter.*[33] Indeed, if asylum were to be limited to *non-refoulement,* sheltering refugees in camps will do, provided that camps are safe places (which, in fact, they are not).

Equaling asylum to protection ultimately achieves the separation of the naked life of the refugee from its human possibilities. Asylum would be like a waiting room where the lives of people are put on hold, where one merely stays and serves time. Were asylum only to be protection, precluding a positive aspect that enables refugees to rebuild their lives, the world – according to the beautiful phrase of Jean-Luc Nancy – would not be a world, as it would not give place to everyone, setting large numbers of people aside from the normal order of things. The world would stop being a world as a space of exception would be erected upon its

[30] Hathaway & Castillo, (1997), p. 2. Note that the authors here intimate that asylum extends beyond *non-refoulement*.
[31] Grahl-Madsen (1980), p. 1.
[32] Arendt, H. *Was ist Politik. Fragmente aus dem Nachlaß,* München/Zürich: Piper 2003, p. 122.
[33] See UNHCR, *Refugees Magazine,* issue 123: "The Wall Behind Which Refugees Can Shelter – the 1951 Geneva Convention 50th Anniversary', (July 2001). Available at: http://www.unhcr.org/publ/PUBL/3b5e90ea0.pdf.

surface. The world would gradually become camp-like. It would not be a world, but rather, as Nancy puts it, a 'globe or a glome, a land of exile and a vale of tears.'[34]

But felicitously, the notion of asylum is ambiguous. As Kimminich explains in *Asylrecht* (1968), asylum either refers to protection or to the place where protection is offered.[35] As he further shows, the first meaning came to predominate over the latter: 'Eine erste Unklarheit in der Sprache des Vökerrechts betrifft die Frage, ob das Wort "Asyl" eine Lokalität bezeichnet oder den Rechtsschutz, der dort gewährt wird. Die Völkerrechtslehre hat sich nach anfänglichem Schwanken dazu bekannt, unter Asyl nicht eine Ort, sondern den Schutz zu verstehen …'.[36] Understanding asylum only to denote protection is, of course, motivated by a strategic interest, as Castillo and Hathaway, cited above, already intimated. For then it can easily be argued that refugees are allowed to stay for the time necessary for the purpose of fleeing protection. Once the facts and circumstances that compelled protection no longer prevail, protection is to be withdrawn and refugees are supposed to return home.

However, the abortive effort to draft a Convention on Territorial Asylum in 1977 put the importance of place back on the table. Indeed, perhaps the importance of the failed conference was that it intimated, by referring to *territorial* asylum in its title, that the protection offered with asylum is contingent upon the place where it is offered. To limit asylum to protection, ultimately counteracts the explicit purpose of the Refugee Convention. Indeed, the restoration of the legal person of the refugee, so as to assure him the widest possible exercise of his rights and freedom, is contingent upon the refugee's legal emplacement within the host community. By taking place into account in the concept of asylum, the possibility that refugees become rooted again is anticipated. To be sure, asylum is an interim measure that, in itself, remains silent on a right to integration, or an obligation to return. But insofar as asylum not only signifies protection but also expresses that protection is contingent upon place, it designates the possibility that people become rooted again. Grahl-Madsen, who participated in the drafting process of the Convention on Territorial Asylum, seemed to have had something similar in mind. Breeding on the meaning of asylum, he argues: '[Once] a refugee has stayed in a given territory for a number of years and thus has grown roots there, he is regularly given a right of indefinite (or permanent) residence. But such a right is not inherent in the concept of asylum ... As 'asylum' is used in the draft conventions as a notion different from *non-refoulement* and non-extradition, it would seem that it must have something to do with residence. In my opinion, this ought to be reflected in the text of the Convention.'[37] Residence, he further explains, amounts to allowing refugees to live in the territory, instead of merely remaining and lingering there. 'The word 'live' has not been chosen at random. It is, of course, of little value for a person to be allowed to 'stay' or 'remain' in a territory, if one gets no chance of finding a livelihood.'[38]

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[34] Compare Nancy 2007, p. 42: 'A world is precisely that in which there is room for everyone: but a genuine place, one in which things can genuinely *take place* (in this world). Otherwise, this is not a "world": it is a "globe" or a "glome", it is a "land of exile" and "a vale of tears".'
[35] Cf., Kimminich 1968, p. 7.
[36] Ibid., p. 33.
[37] Grahl-Madsen 1980, p. 52.
[38] Ibid., p. 52.

Sadly, however, the Convention, as said, was not adopted. The final draft was submitted to a conference of plenipotentiaries in 1977. The 1977 conference was the final act of a long-term effort, which started in the 1950's, 'to elaborate upon article 14 of the Universal Declaration on Human Rights.'[39] The main aim was to come to an understanding that states not only have a right to grant asylum, but also, in some cases, are obliged to do so. In order to formulate and establish an individual right to asylum, there was a general feeling that attention should be paid to the notion of asylum. But as it turned out, twenty years proved to be too short a time to come up with anything other than the idea that asylum entails 'something more' than *non-refoulement*, though it was not clear exactly what. The failure of the 1977 conference was, to a large part, due to unresolved haziness of the concept of asylum.[40] As Grahl-Madsen, who participated in the drafting process, summarizes: 'The term 'asylum' has no clear or agreed meaning. However, as used in the draft conventions before us, the term 'asylum' must clearly mean something more, or something different, from both *non-refoulement* and non-extradition.'[41]

So, we are now left with a pivotal concept of refugee law, to wit asylum, of which we are uncertain as to its exact meaning, except for the fact that it entails 'something more' than *non-refoulement*. The lack of a clear comprehension is no doubt due to the political sting in the concept of asylum as it foreshadows permanent settlement.[42] However, the lack of agreement on the concept of asylum – and the concomitant favoring of repatriation as a durable solution to the problem – cannot only be blamed on reluctant states that, true, have shown themselves to be stubbornly unwilling to take refugees in. If, to this very day, the content and meaning of asylum remains unresolved, it is due to some of the most fundamental presuppositions that shape our understanding of the refugee problem, and that motivate the international legal response thereto. The concept of *de facto* statelessness is at the root of the perplexities that pertain to the concept of asylum. In the section below, I will critically take issue with the concept of *de facto statelessness,* and put doubt on the sharp delineation thereof from the concept of *de jure* statelessness. If, I will argue, the distinction between the two is not as clear cut as is commonly believed, we will arrive at a more profound understanding of the fundamental dilemma the refugee is facing. Consequently, an adequate understanding of the refugee's plight sheds light on exactly what he is seeking by claiming asylum.

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[39] Ibid., p.14.

[40] Another reason for its failure was that it proved to be impossible to formulate an individual right to asylum. In the draft Convention, asylum remained within the discretion of state power. (Cf., Hathaway 1991, p. 14). Nonetheless, Grahl-Madsen is right when he argues that '[a]s a matter of fact, in many countries, there are provisions of municipal law laying down a more or less perfect right of asylum for individuals.' However, this does not solve the issue of a definition of asylum beyond *non-refoulement*. Grahl-Madsen continues to explicate what this right to asylum entails: 'It may be a matter of non-extradition, of *non-refoulement*, or a matter of asylum in more general terms, which normally includes a right to stay in the country of question for such a time as may be necessary for the purpose of escaping persecution or other forms of pursuit by a foreign state.' (Grahl-Madsen 1980, p. 24).

[41] Ibid., p. 50.

[42] So, when Grahl-Madsen judges asylum to refer to residence and finding a livelihood, he is keen to add that perhaps it is best not to mention the word asylum, at all. (Cf., Ibid., p.52).

5.4 Asylum Beyond *non-refoulement*

In order to demonstrate why the master frames that shape the current understanding of the refugee problem cause the concept of asylum to be in complete disarray, let me briefly return to Chapter Two, where *de facto* statelessness was discussed.

As shown in Chapter Two, *de facto* statelessness serves as the conceptual tool for understanding the dire predicament that befalls refugees upon fleeing and as such directs the legal response to the problem. Arguably, *de facto* statelessness has one clear advantage: It clears away any misunderstanding as to the international community's legal responsibilities towards refugees. This is worth stressing, since states – as has been repeatedly argued throughout this book – increasingly wriggle out of their responsibilities to protect refugees, the apex of which seems to be the adoption of a proactive human rights strategy that seeks to secure a right to stay in one's own country by preventing human rights violations that would otherwise cause refugee movements. In this line of reasoning, as explicitly put forward by the Dutch government in its 2004 note *Naar een Menswaardig Bestaan*, the right to leave and seek asylum simply disappears from view.[43] Sweden actually implemented such a proactive strategy in the case of the Sudan, in order to prevent and contain refugee movements. As Harell-Bond & Verdirame observe: '[T]he Swedish International Development Agency (SIDA) admitted that it was 'prioritizing activities inside the Sudan to make refugees to return [*sic*] or for the inhabitants of the Sudan to stay back.' To the extent that these activities had the effect of making flight more difficult for the people, donors and NGO's were interfering with the very right to seek asylum.'[44] But *de facto* statelessness informs, precisely, that the international community is to address the situation that befalls refugees after they flee their home countries. It conveys that the chief characteristic of the situation that comes into being after fleeing is the lack of legal protection. The purpose of the international refugee protection regime, therefore, is to offer international (surrogate) protection to this specific class of unprotected persons, instead of attacking the root causes that cause people to flee in the first place or engage in the creation of safe conditions that enable people to stay.

At the same time, however, *de facto* statelessness blurs what is at stake. Even though it rightly informs that the refugee is suffering from a lack of protection due to an ineffective nationality, it eclipses the fundamental dilemma the refugee is facing because of this lack. The sharp delineation of the refugee problem from the issue of statelessness accounts for this eclipse.

Recall from Chapter Two, that in the mid of the Twentieth Century, a sharp conceptual line was drawn within the group of unprotected persons that distinguished those who are stateless *de facto* from those who are stateless *de jure*. This difference between the refugee and the stateless person was legally sealed with the adoption in 1954 and 1961 of the two Stateless Conventions that are both materially and formally different from the 1951 Refugee Convention. Though it proved to be a difficult task to draw the line between the refugee and the stateless person – as is evidenced by the drafting history of the 1954 Convention as

[43] Refer to Chapter One.
[44] Verdirame & Harell-Bond 2005, p. 278.

discussed in Chapter Two – it was decided that the latter are stateless *de jure,* whereas the refugee was considered to be only *de facto* stateless. So, the difference between both classes of unprotected persons consists in the formal lack of state protection the stateless person is suffering due to the absence of nationality, whereas the lack of protection the refugee is suffering is the factual result of circumstances in his home country that compelled him to flee. The stateless person, in other words, is destitute of protection as a matter of law; the refugee as a matter of fact. *De facto* statelessness thus reflects that the lack of protection is the symptom of which persecution is the disease. It reflects, that is, that the absence of legal protection is due to a degenerated or perverted relation between the individual and the state responsible for his protection. The refugee, in short, is suffering from an ineffective bond of nationality; the stateless person has no nationality at all, and is left unclaimed by any and every state. As *de jure* statelessness is what is commonly understood by statelessness, it is argued that statelessness is not ingredient to the refugee problem.

The conceptual difference between the lack of protection due to the absence of nationality and as the result of an ineffective nationality, has been recently reaffirmed during an expert meeting on statelessness in Prato, organized by the UNHCR in 2010: 'Although there may sometimes be a fine line between being recognized as a national but not being treated as such, and not being recognized as national at all, the two problems are nevertheless conceptually distinct: the former is connected with the rights attached to nationality, whereas the latter problem is connected with the right to nationality itself.'[45] It is noteworthy that during the Prato meeting, the view was expressed that '[w]hile refugees who formally possess a nationality are *de facto* stateless, participants indicated that it was not useful to refer to them as such because this would create confusion.'[46] But, what creates the confusion, I submit, is the very conceptual difference between refugees and stateless persons.

There is a clear presumption, widely held until recently, that the falling apart of the refugee and the stateless person with different independent Conventions has been beneficial to refugees, but disadvantageous to the stateless. This is no doubt due to the continuing reluctance of states to view nationality as a matter of international concern, which explains why a large number of states abstain from ratifying the Statelessness Conventions. States' disinterest in the problem of statelessness is further evidenced by the imbalance of research attention paid to the respective problems, and the allocation of funds within UNHCR to refugees, at the cost of those who are stateless. As Van Waas observes: 'For many years following the formulation of the Statelessness Conventions, while existing cases of statelessness remained unresolved and new cases continued to surface, it was not an issue with which the international community actively engaged. Instead, mass displacement and the battle to deal with ever-increasing numbers of refugees took priority.'[47]

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[45] UNHCR, Summary Conclusions Expert Meeting 'The Concept of Stateless Persons under International Law' May 27-28, 2010, p. 2.
[46] Ibid., p. 6.
[47] Van Waas 2008, p. 17.

Admittedly, if we just look at the facts and numbers, it can hardly be denied that the issue of statelessness is (or was) a changeling, causing the stateless to be left unprotected and forgotten (though things are changing today, given the amount of research effort paid to the issue by both academics and UNHCR). But if we take matters to a conceptual level, the picture changes. As counter-intuitive as it might appear at first glance, the hard-boiled conceptual distinction between the *de facto* and *de jure* statelessness ultimately comes at the detriment of the refugee. I am not saying that the legal position of the stateless person is favourable over that of the refugee, or that statelessness, as Arendt said, is a relatively innocent problem. Arguably, it is not. But the conceptual understanding of the problem of statelessness is at least perceptive to the fundamental dilemma involved. As was argued during the Prato meeting, the problem of statelessness is connected with the right to nationality. The ultimate consequence of having no nationality is that the stateless person has no right to live anywhere. What is at stake with statelessness is the very right to have rights.

True, neither the 1954 Stateless Convention, nor the 1961 Convention on the Reduction of Statelessness, create a right to nationality. But there is no question as to what is to resolve the predicament of the stateless. As UNHCR explained in its recent strategy note, 'Action to Address Statelessness': 'In fact, grant of a status [of statelessness, NO] can be a stepping-stone to acquisition of nationality.'[48] Equally true is that article 34 of the Refugee Convention calls upon states to facilitate the integration and naturalization of refugees present in their country. But if return takes priority, almost up to the point that integration becomes a forgotten solution, the blame is not only on reluctant sovereign states. It also follows from the identification of the refugee problem as a problem of *de facto* statelessness that effectively denies that the refugee, like the stateless person, is facing the fundamental dilemma: where to live? The denial of this fundamental dilemma with respect to refugees was thrown into relief during the Prato meeting. The aim of the meeting was to draft guidelines on the concept of *de* facto statelessness. In fact, it even appears that a general feeling took hold at the meeting that there is no conclusive difference between *de jure* and *de facto* statelessness. It was argued, for example, that 'some categories of persons hitherto regarded as *de facto* stateless are actually *de jure* stateless, and therefore that particular care should be taken before concluding that a person is *de facto* stateless rather than *de* jure stateless.' [49] But most importantly, agreement was reached that *de facto* statelessness should be defined on the basis of the functions of nationality in international law.[50] One of the functions of nationality, it was stressed, is the right to return to the state of nationality. If a person is outside his or her country of nationality, and the state of nationality refuses him or her a right to re-enter the country, he or she has to be considered as *de facto* stateless. As *de facto* statelessness arises from the inability to return, the dilemma a *de facto* stateless person is facing is: where to live? I fully agree with this. Indeed, from the perspective of the right to have rights, the dilemma that is at issue with *de jure* statelessness is the same as the problem that is at issue with *de facto*

[48] UNHCR 'Action to Address Statelessness: a Strategy Note.' *International Journal of Refugee Law*, vol. 22 (2010), no. 2, p. 313.
[49] UNHCR, Summary Conclusions Expert Meeting 'The Concept of Stateless Persons under International Law' pp. 27-28, May 2010, p. 5.
[50] Cf., Ibid., p. 6.

statelessness. But, why was it admitted during the Prato meeting that refugees are, indeed, stateless *de facto*, but that it is not useful to refer to them as such? It is not useful because of the current political state of affairs in which the temporary nature of refugee protection is stressed with the effect that the return home of refugees takes priority. It is not useful, because this predominance of return presupposes an ongoing relation between the refugee and his own country. Because of a shift today that establishes a proximity between *de jure* and *de facto,* while excluding the refugee problem from the ambit of statelessness altogether, it is necessary to closely consider the role of nationality within international law.

It is important to note that the Prato meeting seems driven to establish *de facto* statelessness as a legal category. In what follows, however, I continue to make use of *de facto* statelessness as a concept that identifies the refugee problem.

So, let me repeat: Albeit currently broken or ineffective for reasons of a well-founded fear of persecution, the concept of *de facto* statelessness within the context of refugee protection upholds the relation between the refugee and the state of which he is a national. Or, in more adequate terms that capture both the state of nationality and of habitual residence as is referred to in the refugee definition of the 1951 Refugee Convention: It assumes a continuing relation between the refugee and his own country.

True, this relation is crucial for establishing a protection need which requires that the actors of persecution be identified. But the point of the matter is that *de facto* statelessness does not make the refugee's nationality or own country irrelevant upon recognition.

In Chapter Two, it was argued that nationality is the precondition of the enjoyment of rights and freedom, as it establishes the relation between the individual and the state responsible for granting and protecting these rights. In *Nationality and Statelessness in International Law* (1971), Weis therefore depicts nationality as an element of order, as it allocates individuals to a state.[51] Nationality, in short, emplaces the individual. As *de facto* statelessness relies upon the refugee's nationality (or his particularistic attachments to the country of habitual residence) it, presupposes that the refugee, at the end of the day, ought to be there where he, on account of his legal emplacement, ought to be, not here, where he does not belong.

However, there is another meaning of nationality implicit in the formal understanding thereof. This additional meaning gradually comes to the fore in Van Waas' explication of the importance of nationality. The right to freedom of movement, she argues, is a function of nationality as the latter entails (1) the right to re-enter one's own country, (2) the right to remain and, (3) the right to leave. Echoing Arendt, who cautions that refugees and the stateless are only in appearance free to move, as their 'free' movement 'gives them no right to residence',[52] Van Waas reveals the impact of the lack of nationality for stateless persons (to which she, contra Arendt, limits her argument): 'This fact signals a grave potential difficulty for the stateless: no nationality so no automatic right to (re)enter or reside anywhere. With this observation in mind, the right to international free movement for the stateless is not only relevant to the ability to

[51] Cf. Weis (1959), p. 53.
[52] OT, p. 296.

"vote with one's feet" … but indeed reveals a core basic dilemma: where do they have a right to live?'[53]

But to live somewhere clearly entails more than just to reside. Indeed, this is what the very expression 'his or her own country' reflects. It expresses that to live somewhere entails, first and foremost, to have a place of one's own. To have a place of one's own means to be embedded within a meaningful network of relations upon which one relies and for which one is concerned. To have a place of one's own is to inhabit a world. Indeed, because human beings engage with their world, they acquire a sense of usefulness, worthiness and belonging. This is what the existential analytic of Dasein, discussed in Chapter Four, revealed: By means of their concern, by means of engaging with the world, human beings acquire an identity. We humans understand who we are from where we are and what we are doing.[54] The expression 'his or her *own* country' expresses, precisely, that identity is intimately bound with the place where one finds oneself.

The existential significance of our everyday life, in which we inhabit a world which is familiar to us and gives us a sense of identity, belonging and worthiness, painfully comes to the fore in Bertolt Brecht's *Flüchtlingsgespräche* (1940). The two refugees Ziffel and Kalle, who figure in the play, understand by default that to live somewhere, to have a place of one's own is key to who they are. In their conversations, they picture to each other the countries they went to or came across in their escape from *Der Wieheißterdochgleich,* but where they were unable to take up a place. Ziffel tells Kalle that Switzerland is famous for its freedom, but that to experience Swiss freedom, one must go there as a tourist. Kalle confirms that, telling him that he was in Switzerland, but didn't feel free, as he was not a temporary visitor with the prospect of going home, but was a refugee. Ziffel conjectures that Kalle didn't stay in a hotel, for if he did, he would have been free to go wherever he pleased. Denmark is famous, the two agree, for its humor. But, as Kalle remembers, his mother used to spread his bread with humor when they were out of butter. It tasted good, but wasn't really satisfying. They both heard of a man, also a refugee from *Der Wieheißterdochgleich*, who went to Norway, famous for its neighborly love. But, neighborly love isn't really satisfying, either, if one is out of place.

Wherever the refugees went, whatever country they came across, they saw freedom, humor, neighborly love which, however, were of no avail to them, as they didn't find a place (nor were granted such a place) where they could be at home again. Absent such a place, they seemed to have lost themselves. Ziffel, a great physician in Germany before the outbreak of the war who made an important discovery in his scientific field, is working on his memoirs. One day he tells his friend that he decided to quit his writings, as his life, which is no life, is not worth being told. Kalle tries to cheer him up, encourages him to write about minor experiences if there is no great success story to tell. In his response, Ziffel implicitly draws upon the difference between residing, and living somewhere: 'Das ist die Theorie, daβ jeder ein Leben hat, aber sie ist eine Erschleichung, denn das gilt nur

[53] Van Waas (2008), p. 246.

[54] For a philosophical and anthropological understanding of the relation between place and identity see Waldenfels, B. 'Phenomenology of Space: Being Here and Elsewhere', in Lindahl, H.K. ed., *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice*, Oxford/Portland: Hart Publishing 2009, pp. 95-114.

logisch, indem man siebzig Jahre Vegetieren eben Leben nennen kann, aber auch drei Jahre … Natürlich kann man von allem interessant reden, aber nicht alles verdient Interesse. Jedenfalls bin ich schon fertig mit meinen Memoiren, das ist traurig genug.'[55]

The loss of a world is tantamount to the loss of identity. That is why the refugee, according to Améry, is the one who can no longer say We, nor for that matter, I. Améry who, as Finkelkraut puts it, 'has also had the radical and desperate experience of being absolutely nowhere in the world',[56] therefore, yearns to belong again somewhere. From the experience of his own displacement, of being absolutely nowhere, he became aware of the human need to have a place of one's own, to have a *Heimat*. He, therefore, ends his reflections upon his own loss of a place in the world with the down- to- earth statement: It is not good not to have a *Heimat*.

The loss of an own-place, to belong nowhere in the world, is the sad and desperate experience of the refugee. But the notion of *de facto* statelessness fails to grasp the refugee's predicament in full. Indeed, the sharp-edged distinction between *de facto* and *de jure* statelessness implies that the most pressing problem for human beings, both in a legal and an existential sense, is kept in reserve for the stateless. This is most clear in the argument developed by Van Waas. According to her, the stateless (but not refugees) face the fundamental dilemma of having no right to live anywhere because they lack a nationality. They are, she says, subjected to a harsh game of human ping-pong, driven away everywhere. They are, she thus argues, at risk of becoming refugees. Van Waas equally acknowledges that refugees, on their turn, are at risk of becoming stateless. Nevertheless, on the basis of the very distinction between *de facto* and *de jure* statelessness, she holds the fundamental problem of lacking an own-place in reserve for the stateless. This problem becomes clear, among others, in her discussion of the proclaimed universality of human rights in relation to the existence of statelessness. 'As long as every individual holds a nationality', Van Waas writes, 'the universality of these documents remains intact: everyone can enjoy these rights in relation to at least one country, so no one is excluded ... In practice then, the existence of statelessness interferes with the universal ambition of the human rights regime.'[57] Van Waas is perceptive to the fact that the position of asylum seekers and refugees is also detrimental to this universal ambition. Still, she argues: 'However, their position can be resolved by their return to their state of nationality – admittedly an unfeasible option in the case of forced migrants and refugees – whereas that of the stateless requires the (re)instatement of citizenship.'[58]

But if it is admitted that return 'home' is an unfeasible option for refugees, why not also admit that they face the fundamental dilemma: where to live. The quandary is as severe for them as it is for the stateless, and fully comes to the fore if we take 'state of nationality' to also denote the individual's own country. Indeed, the double meaning of nationality that finds expression in 'his or her own country' puts doubt on the sharp distinction between *de facto* and *de jure* statelessness.

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[55] Brecht 2000, p. 71.
[56] Finkelkraut, A. *In the Name of Humanity. Reflections on the Twentieth Century* (translated from the French), New York: Columbia University Press 2000 p. 102.
[57] Van Waas, p. 223.
[58] Idem, p. 223, at footnote 35.

In his early study on statelessness, Weis has made some important observations in this respect. Next to its formal and technical role of allocating an individual to a state, nationality, he argues, also carries an ethical or spiritual meaning. Nationality, he holds, 'means, in a spiritual sense, a certain community of interests, habits and thoughts derived from residence, upbringing and common conditions of life within the community of a state.'[59] States that strip their nationals of their legal and political status, either in law or in fact, sever this spiritual relation as well. People with no nationality, or people who can no longer rely on their nationality, are therefore not only a legal anomaly. They are an absurdity as well, as if they are devoid of any such specific human relationships. Weis draws the conclusion that '[t]hese fundamental facts of loyalty and affection must not be overlooked when questions of nationality have to be decided; once a conflict arises between spiritual and formal facts, the former may even claim preponderance before outward facts and appearances such as residence or former nationality.'[60] In *The Rôle of Nationality in International Law: an Outline,* (1959) Van Panhuys makes a similar point as he argues that in matters of nationality it is equally worth considering whether the individual still regards his country of origin as his true fatherland.[61]

It is important to note that Weis developed his argument at a time when the national-socialist regime was beginning to waver and its eventual defeat a prospect in view. He therefore anticipated the possibility that the discriminatory laws of Nazi-Germany were to be abolished. This would grant refugees from the war the opportunity to return 'home' to Germany and acquire their former nationality. But Weis empathically considers 'that many Jews … will be unwilling to return to their countries where they have suffered indescribable hardship, where their brothers and sisters have been persecuted and murdered. They have severed the spiritual links with their homeland and have dissociated themselves from it.'[62] Their repatriation was, therefore, out of the question, according to Weis.

Indeed, the spiritual link Weis discerns with respect to nationality, which ensures that a person regards his state of nationality as his own country, constitutes the very reason why refugees, according to Weis, are to be considered as *stateless*. They are, to borrow from the French, *apatride*, without a fatherland. Thus Weis, at the beginning of his study on statelessness which he completed in 1944, expressed the opinion that his reflections on statelessness equally apply to refugees: 'It would be outside the scope of this paper to deal with the refugee problem, but some of the considerations, and in particular, the suggestions made in this paper for the protection of stateless persons, apply equally to refugees.'[63] Weis' reasoning intimates that the distinction between *de facto* and *de jure* statelessness, which began to take hold in the period of his early writings, is not as trenchant as it might appear at first glance.

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[59] Weis, P. *The Problem of Statelessness*, published by the British Section of the World Jewish Congress, July 1944, page 21. Importantly, Weis shows that the importance of 'spiritual connection for determining questions of nationality has even found expression in legal enactments.' To substantiate his claim, he refers to article 5 of the Hague Convention on Certain Questions of Nationality Law, which expresses that in cases of nationality conflict, an individual's nationality may be determined on the basis of the 'close connection' an individual has with a certain state of nationality.

[60] Ibid., p. 21.

[61] Cf., Van Panhuys 1959, p.26.

[62] Weis 1944, p. 24.

[63] Ibid., p. 4.

Indeed, the dual aspect of nationality renders conspicuous the failure of *de facto* statelessness to capture the plight of refugees. Nationality allocates the individual to a state which he considers as his own country, where he inhabits a world, is at home and can be himself. Nationality, that is, emplaces the individual, allowing for each to have a place of his own. Hence, Lindahl, with respect to emplacement, argues: 'Remember, in this context, the two meanings of the compound adjective *ennomos*, namely 'keeping within the law' or 'law-abiding', and 'quartered' or 'dwelling in a country.'[64] With respect to refugees, the place where they ought to be and supposedly belong no longer necessarily coincides with their dwelling place. Hence the eternal complaint of refugees who face return to their country of origin, that it is no longer their homeland. Over the past few years, Dutch media covered some of the most hurtful stories of refugees facing removal. Upon the very first question, 'How do you feel about going home?', refugees always and unanimously responded, 'Holland is my homeland.' Ugresic's novel, *Ministry of Pain,* puts the fracture in the spotlight. The protagonists of the novel – all immigrant, – and refugee students from the former Yugoslavia living in Amsterdam – decry during a course on 'their' language, 'their' literature and 'their' culture: *What fucking fatherland?!*

Here, we run counter to the obvious, yet inevitable, fact that law does not exhaust the question of life, - or for that matter, what it means to be a refugee. Law defines a refugee as a person who escaped his country of origin. But, in everyday language we say: The refugee has lost his home. Refugee law understands refugees to have lost state protection. But, in everyday language we say: Refugees have lost everything. The one who flees does not put his life in two large suit cases. He who manages to flee leaves everything and everyone behind.

Perhaps Arendt's reflection on the refugee problem in *The Origins of Totalitarianism,* is as shrewd as it is because of her own experience of being a refugee. Her account of her own flight certainly is informative. In 1933, Arendt and her husband escaped from the hardships Jews had to suffer in Germany, and which were likely to be intensified after Hitler's rise to power. On May 5, 1940, France, in which they took refuge, started to detain refugees from Germany, issuing that all men and women were to report to the French authorities to be transferred to internment camps. Arendt, too, was detained, first in the Vélodrome refugee camp, then in Gurs, where one year later Améry was also detained. There, the only relevant, meaningful and serious question for Arendt was whether to take her own life.[65] Fortunately, Arendt did manage to escape. In 1941, she arrived in New York, where she wrote down her experience of being a refugee – a new class of people, she believed, who 'are put in concentration camps by their foes, and into internment camps by their friends'.[66] 'We lost our homes', Arendt writes, 'which means the familiarity of daily life. We lost our occupation, which means the confidence that we are of some use in this world. We lost our language, which means the naturalness of reactions, the simplicity of gestures, the unaffected expression of feelings. We left our relatives in the Polish ghettos, and our best

[64] H. Lindahl, 'Give and Take: Arendt and the Nomos of Political Community', Philosophy *and Social Criticism* (2006) vol. 32, p. 887.
[65] Cf., Young-Bruehl, E. *Hannah Arendt. For Love of the World,* New Haven/London: Yale University Press 1982 p. 154.
[66] Arendt, H. *The Jew as Pariah,* New York: Grove Press 1978, p. 152.

friends have been killed in concentration camps, and that means the rupture of our private lives.'[67]

Arendt, however, makes painfully clear that what refugees lose upon fleeing, they had already lost. That's why the students in Ugresic's novel exclaim, *What fucking fatherland?!* All they can remember from their fatherland is that it claimed their lives and compelled them to kill their neighbors and friends.

In her account of the refugee experience, Arendt enlists everything she lost upon fleeing. But what had she lost before her flight? She speaks of that in the famous interview with Gaus from 1964, which was published in 1965, under the title 'Was bleibt? Es bleibt die Muttersprache.' In response to the question, what shocked her about 1933, Arendt explains that it was not Hitler's rise to power: 'People often think today that German Jews were shocked in 1933 because Hitler assumed power. As far as I and people of my generation are concerned, I can say that this is a curious misunderstanding. Naturally, Hitler's rise was very bad … [But] we did not need Hitler's assumption of power to know that the Nazi's were our enemies! That had been completely evident for at least four years to everyone who wasn't feebleminded. We also knew that a large number of the German people were behind them. That could not shock or surprise us in 1933. …The problem, the personal problem, was not what our enemies did, but what our friends did. In the wave of *Gleichschaltung,* which was relatively voluntary – in any case, not yet under the pressure of terror – it was as if an empty space formed around one.'[68] A refugee, Arendt intimates, does not flee his or her homeland where one moves around freely and in a familiar way, - where one is at ease and inscribed in a network of narrations and relations that gives one a sense of belonging and identity. One flees, instead, from a country that is no longer familiar. One flees from a place, not where one is at home, but from an empty space. Brecht's play also alludes to this. When Ziffel asks Kalle what constituted the reason for his flight from Germany, Ziffel's response seems to imply that Germany was no longer his country. He was not civilized enough, he says, 'als daβ ich in dem ganzen Dreck hätt menschwürdig weiter existeren können. Nennen Sies Schwäche, aber ich bin nicht so human, daβ ich angesichts von zuviel Unmenschlichkeit ein Mensch bleiben kann.'[69]

The concept of *de facto* statelessness blurs all of this. Presupposing that refugees, at the end of the day, ought to be there, i.e., in their 'home' country where they supposedly naturally belong, not here, it fails to see that the refugee flees from an empty space. It fails to see, in other words, that the refugee is neither here nor there, but is, instead, nowhere. The refugee, upon his arrival here, is not emplaced, i.e., is not where he, on account of his nationality, ought to be. But neither is the refugee simply misplaced by virtue of being where he ought not to be. Neither emplaced nor misplaced, the refugee is, rather, lacking a place of his own. He is, that is, *displaced* in the exact sense that Lindahl understands the term: '[I]ndividuals who are not in-legal-place … are not simply misplaced in virtue of not being where they ought to be; instead they are *displaced*, that is to say, they claim a legal place of

[67] Ibid., p. 55.
[68] Arendt, H. *Essays in Understanding 1930-1945. Formation, Exile, and Totalitarianism* (translated from the German, Kohn, J. ed.), New York: Schocken Books 1994, pp. 10-11.
[69] Brecht 2000, p. 52.

their own for which there is no place within the distribution of places made available by a region.'[70]

It is time, therefore, to acknowledge that the refugee and stateless problem not only converge on the ground, -- with stateless persons being (at risk of becoming) refugees, and refugees at risk of becoming stateless – but that the strict division between them on a conceptual level is unattainable as well. If we accept that statelessness not only amounts to the absence of nationality in the formal legal sense, but also refers to the lack of an own country, that is, to the experience of lacking a place of one's own, it can be argued that statelessness (though not essential to the refugee definition that directs the procedure to establish a protection need) is the fundamental dilemma the refugee is experiencing. And if we are prepared to accept that the loss of state protection that befalls the refugee upon fleeing equals the loss of a homeland, a *Heimat*, the legal response to the refugee problem can be patterned accordingly. To consider the lack of an own place to be ingredient to the refugee dilemma would at least resolve some of the perplexities that pertain to the content and meaning of asylum, and which resurfaced with the recently proclaimed right to asylum. For it would enable us to see that asylum not only amounts to protection, but also, and above all, refers to the place of protection. Indeed, if asylum refers to 'something more' than *non-refoulement,* as was argued during the failed conference on Territorial Asylum, this 'something more' reflects the fact that the restoration of the legal person of the refugee so as to assure him the widest possible exercise of his rights and freedoms is contingent upon assigning a *legal* place to refugees. Asylum, in short, grants refugees protection by virtue of emplacing them in host societies. By taking the notion of place back into the account of asylum, the possibility that refugees become rooted again is anticipated. Indeed, being displaced, the refugee, by claiming asylum, seeks a new place of his own where he can inhabit a world again.[71] Asylum, therefore, entails the anticipated possibility of becoming rooted again.

That said, it is important to stress the aspect of anticipation that appertains to the concept of asylum I have elaborated. As the *anticipated possibility* of becoming rooted again, asylum is not a monochromatic and rigid right, but is, rather, a pliable one. The grant of asylum does not of necessity result in permanent settlement. There will always be refugees who continue to regard the escaped country as the

[70] Lindahl (2006), pp. 888, 889.

[71] In Chapter Three I have sought to illuminate a polity's self-understanding from the heideggerian understanding of being-in-the-world. The notion of asylum, understood as the anticipated possibility of becoming rooted again, might benefit as well from the notion of world which stands at the center of Heidegger's thinking. Even more general, the very expression 'one's own country' can be illuminated from the basic tenet of Dasein as being-in-the-world. Recall from Chapter Three that the Human Rights Commission defined the notion of 'his own country' to embrace, at the very least, an individual's special attachments to a country. Though Noll does not elaborate the notion of 'one's own country, he does develop a heideggerian argument with respect to undocumented immigrants, for whom the notion of one's own country might be of special importance as it is broader than 'country of origin' or 'country of nationality.' Proceeding from the quandary that the undocumented immigrant cannot appear in the polis to claim his or her rights, Noll argues that Heidegger's move to dwelling as the basic tenet of human existence, casts new light on the appearance of the immigrant. Dwelling, which is close to being-in-the world and concern, 'unconditionally presences those undocumented migrants who have found a home, however precarious, on the territory of a host state.' Noll contrast Heidegger's account of space with that of others (Schmitt, Arendt), arguing: 'All other accounts of space, territory and jurisdiction end in the conclusion that the undocumented migrant is incapable of appearing jurisdictionally as anything else than a detainable and removable person.' (Noll 2010, p. 253).

homeland for which they keep longing. There will always be refugees who, upon their own decision, will return home. Their wish to return (or to stay) may change over time, and will be motivated by a penumbra of facts that are, for a large part, unpredictable due to the jagged course a human life takes.

But the decision to say farewell to the asylum country does not refute the argument that the claim to asylum is a claim to an own place. Refugees who will eventually return, and refugees who can or will never return, should be treated on equal footing, if only because it cannot be decided beforehand who returns and who doesn't. But, apart from that, refugees who do eventually return want to have a normal life for as long as they stay in the country that offered them asylum. No human being should be subjected to the torment of a life that is suspended between arrival and departure. No human being can live his life in the waiting zone between the country of asylum and the homeland. In this respect, it is important to keep in mind that the rights the Refugee Convention provides for – such as the right to freedom of movement and religion, and the right to work, education and property – are, indeed, the rights of refugees, not of prospective citizens. Refugees should be granted these rights during the time of protection. And if refugees do decide to return, they leave a country where they have been safe and have felt confident, and which, if not a home, at least has been a breathing place for them.

Through the looking- glass of the anticipated possibility of becoming rooted, the right to asylum beckons governments to develop and embrace asylum policies that better serve the aim of the Refugee Convention. Asylum, taking in the twofold sense of 'protection' and 'place of protection', denounces overblown claims that return will always be a prospect in view for each and every individual that bolsters the current fixation on return. But, it also tempers the baleful view that protecting refugees opens up the floodgates.

In the sections that follow, I will demonstrate the relevance and pertinence of the right to (seek) asylum thus understood in the context of current issues in refugee law.

5.5 Benevolence versus Hostility: on RABIT's and Refugees

The preceding pages demonstrated that the right to have rights not only captures the problem of statelessness, but also is relevant within the refugee context, - perhaps even more so, because the refugee is outside his or her own country. Note that the right to have rights not only attaches to refugees who are also stateless, in a formal sense. It throws the predicament of refugees as such into relief. So, if the international community concerns itself with the protection of those who are suffering from a lack of protection, it might do better to focus on the shared aspects of statelessness and the refugee problem, instead of holding onto the differences between them. I do agree there is a difference between the failure to protect the rights that attach to nationality, and the lack of protection as it is connected to the right to nationality. But there is no definitive or solid reason to equate the latter with the problem of statelessness and limit the former to the refugee issue. Instead, the focus should be on the lack of protection within the context of displacement, which I take, in the strongest sense, as the lack of an own

place which is legally sealed and guaranteed. The right to have rights is the right of those who belong nowhere. It becomes relevant, therefore, whenever people are forced out of their own country.

The argument I elaborated with respect to the right to (seek) asylum would be of little positive value if it were unable to prove its worth and relevance within the concrete context of asylum practice and legislation. The pages that follow will therefore be dedicated to the question whether the current practice of asylum can be attuned to this refounded concept of asylum.

I will start with the right to seek asylum. The basic elements that constitute the reality and effectiveness thereof are of no great surprise to anyone familiar with refugee law. They are, recall, non-penalization of illegal entry, the prohibition of *non-refoulement*, and access to a fair and equal asylum procedure that calls for good decision- making on the merits of every asylum claim.

As argued before, these key elements testify to, or express, a benevolence and treatment in good faith of refugees. Moreover, with benevolence and treatment in good faith of those who unexpectedly appear at our threshold, we also deal with the ambiguities at the origins of our own existence as a people. Sadly, however, benevolence and good faith came to be subjected to the destructive force of the logic of abuse that took hold of our asylum policies, as has been discussed in Chapter One. Inevitably, the fall into destruction of benevolence inflicted damage upon the key elements that ensure the right to seek asylum, undermining the asylum system as a whole. As Guild argues in her critical analysis of how European enlargement and integration affected upon EU Member States' obligations to refugee protection, refugees have become 'the objects of increasing efforts to render them invisible in practice by ensuring they are not physically present.'[72] Consequently, the EU, according to Guild, 'constitutes a territorial integration project which is hostile to refugees.'[73]

Hostility certainly accompanied the logic of abuse that disproportionally grew out of the legitimate interest states have in an effective return policy of rejected asylum seekers. Without any return policies in place, there is, admittedly, really no point in having an asylum procedure at all. The failure to return damages the credibility of the asylum system, and creates the additional difficulty that it becomes liable to abuse by immigrants who enter the asylum procedure with a view to *de facto* immigration. As demonstrated in Chapter One, however, a distasteful sequel developed from 'return of rejected asylum seekers', to 'abusive claimants', ending in the prevention of illegal entry that affected both asylum seekers and other immigrants.

Indeed, the loss of benevolence and good faith unavoidably caused the downfall of the key elements that guarantee the right to seek asylum. As distrust and hostility took over, the examples of the disintegration of the refugee's legal position are abundant, and I will not discuss them all. In particular, the demise of benevolence hits hard on the refugee's opportunity to construct a credible asylum account and to convince the authorities that he is in need of international protection. Illegal entry, in and of itself, seems to be a reasonable ground to deem the account

[72] Guild (2006), p. 633.
[73] Ibid., p. 634.

incredible beforehand. Indeed, proper documentation that state identity and nationality of the claimant and that used to play an important role in establishing a protection need, now seems only relevant with a view to the claimant's removal. Fulfillment of immigration formalities seem to be secretively added to the public applicable criteria for refugee recognition. As Moreno Lax explains: 'Article 31 [of the Refugee Convention, NO.] does not deal in any way with qualification criteria for refugee status. Its field of application is circumscribed to the possibility to impose penalties on 'refugees unlawfully in the country of refuge', on account of illegal entry or presence. Reading in Article 31, that legal admission constitutes a prerequisite for qualification, adjoins an extra condition to the refugee definition.'[74]

The repercussions of hostility and distrust upon reception and procedure conditions, is also evidenced by the increased use of the accelerated procedure which traditionally was used as an exceptional tool in *clearly unfounded* cases. As a speed-up of the asylum procedure reduces the amount of time an asylum seeker spends on the territory, the accelerated procedure is communicated as a tool to improve the chances of returning rejected asylum seekers. But clearly, the assumption is that the majority of claims will fail, and can be cast as manifestly unfounded. The accelerated procedure, however, undercuts good decision- making on the merits of the asylum claim, as the claimant is given little or no opportunity to provide an account, document his claim, receive meaningful legal advice and repair errors through meaningful judicial review.[75] According to Hathaway and Neve, the accelerated procedure is, therefore, at risk of constituting a breach of *non-refoulement.*[76] Concerns are compounded by the increased standard use of exclusion orders, declaring a failed claimant to be an *undesirable alien*. Exclusion orders, according to Amnesty International, amount to a *de facto* penalization of illegal presence.[77] As Amnesty International observes, exclusion orders 'may impact heavily on rejected asylum seekers who are genuinely considering a subsequent asylum application. Amnesty International's experience over the years has shown that the current accelerated asylum procedure does not always allow asylum seekers … to present a coherent detailed account of their experiences of persecution.'[78]

As to the crumbling away of the key elements that emasculate the refugee in seeking asylum, two developments deserve special attention. The first concerns the EU Return Directive (2008/115/EC); the second relates to the first deployment in the fall of 2010, of a Rapid Border Intervention Team under the coordination of Frontex to the Greece-Turkey land border.

Let me start with the former. The EU Return Directive regulates the position of immigrants illegally staying in one of the EU member states and who face removal. As the Directive aims to set out common standards and procedures for the return of immigrants illegally present within the Union, it functions as a tool for internal

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[74] Moreno Lax (2008), p. 348. See also Amnesty International, Letter to the Members of the Permanent Justice Committee of Parliament, available at: www.amnesty.nl/documentenalgemeeen 101200.pdf.
[75] See Human Rights Watch, *Fleeting Refuge: The Triumph of Efficiency over Protection in Dutch Asylum Policy,* April 2003, available at: http://www.hrw.org, (last accessed April 2009).
[76] Cf. Hathaway & Neve (1997) p. 122.
[77] Amnesty International, *The Netherlands: The Detention of Irregular Migrants and Asylum-Seekers,* doc. EUR 35/02/2008, p. 27. Available at: http://www.amnesty.org/en/library (accessed April 2009).
[78] Ibid., p. 29.

immigration control.[79] According to its article 1, the Directive aims to set these standards and procedures 'in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.' Fundamental rights as general principles of community law include the right to defence[80] and hence the Directive includes a limited number of procedural safeguards, such as the right to appeal or seek review of decisions related to return.[81] It also grants persons time to arrange their own return before measures to carry out forced return are taken.

Disquieting, though, is that the Return Directive only applies to persons who legally entered the EU but who, for one reason or another, managed to illegally stay there. Article 2(A) grants member states the discretion not to apply the minimum standards for removal to those third- country nationals who were refused entry, or who are apprehended and intercepted as they tried to illegally cross one of the EU's external borders.[82] The upshot of this exception is that the Directive, though intended as a tool for internal immigration control, effectively applies as an instrument of external control, by virtue of granting member states the discretion not to apply its provisions at the border. As ECRE argues in its Information Note on the Directive: 'The inclusion of such exception indicates that the Directive, which in principle was intended to regulate the situation of those third- country nationals staying irregularly in the Member States, has been developed into a non-entry tool to complement EU border management instruments.'[83]

Though article 2(A) of the Return Directive refers to article 13 of the Schengen Borders Code that excepts refugees from the category of persons who are to be refused entry,[84] the possibility not to apply the Directive constitutes a potential difficulty for refugees who are often forced to enter illegally. Potentially excluded from the minimum standards of the Return Directive, they are at risk of being removed from the EU, or prevented entry without the safeguards that would have applied had they lawfully entered the Union. This creates the potential risk that they are being *refouled*. According to ECRE: 'It is not uncommon for persons to be detained after apprehension, and then returned expeditiously at the external border of the EU, without their identity being recorded and/or any protection needs ascertained. Another obstacle concerns the practical difficulties faced by third-country nationals refused entry in application of the Schengen Border Code to appeal decisions on non-admission to the territory, due *inter alia* to lack of access to

[79] For the discussion of internal and external immigration, see Chapter One.

[80] Cf. Bast, J. 'Of General Principles and Trojan Horses – Procedural Due Process in Immigration Proceedings Under EU Law', *German Law Journal. Review of Developments in German, European and International Jurisprudence*, vol. 11 (2010) n. 9, pp. 1006-1024.

[81] 2008/115/EC, Chapter III, articles 12, 13, 14.

[82] Article 2(a) reads in full: Member States may decide not to apply this Directive to third-country nationals who (a) are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.'

[83] ECRE CO7/1/2009/Ext/MDM, p. 4.

[84] Regulation EC No. 562/2006 article 13 (1): A third-country national who does not fulfill all the entry conditions laid down in Article 5(1) and does not belong to the categories of persons referred to in Article 5(4) shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.

the legal assistance offered by lawyers and human rights organizations. This means that, while formally reaffirming the obligation to respect the principle of *non-refoulement,* the Directive actually allows national authorities not to put in place the very mechanisms that are key to ensure that the persons excluded from the scope of the Directive are not *refouled* in practice.'[85]

The risk is by no means imaginary, as is evidenced by reports of human rights organizations on the practice of border control.[86] The non-admission policy of Greece, for example, clearly profits from the lack of legal remedies as well as from the absence of sufficient safeguards with regard to judicial oversight of detention of immigrants stopped at the border. In its 2008 report *Stuck in a Revolving Door* Human Rights Watch reports of massive human rights violations by Greek authorities in detention centers and violations of the prohibition of *refoulement*. According to the report, Greece has recorded to have arrested 112,396 immigrants in 2007. The immigrants mainly came from Iraq. They were detained upon arrival and/or deported to Turkey. Turkish authorities subsequently subjected the deportees to a treatment in breach of article 3 EDHR, or immediately deported them to Iraq. Besides rejection at the border, detention and *refoulement,* Greece tries to prevent the arrival of immigrants by intercepting them at sea, allegedly even puncturing their inflatable boats.[87]

The strategy of prevention effectively penalizes illegal entrance and potentially infringes upon the prohibition of *refoulement*. This strategy of prevention that bars access to the asylum procedure is also put into practice by Frontex. In this respect, the first deployment of a Rapid Border Intervention Team (RABIT) in the fall of 2010, under the coordination of Frontex to the Greece-Turkey land border, is particularly revealing.

RABIT is composed of border guard experts and officials from different EU member states, who offer assistance to another member state facing a mass influx of illegal immigrants at an EU external border. According the recital of RABIT Regulation (EC) No. 863/2007, a situation of 'urgent and exceptional pressure' activates RABIT upon the request of the state in crisis. Frontex decides upon the request and subsequently draws up an operational plan that coordinates the actions of the different actors involved (i.e., guest officers from other member states, officers from the host state in crisis and Frontex officials). Border experts and officers coming from a member state other than the state in crisis, are required to perform their tasks under the instruction from, and in the presence of, the border guards of the host state.[88] Upon the request of Greece, FRONTEX Executive Director, Ilkka Laitinen, stated: 'The situation in Greece is very serious. I have decided that Frontex will provide assistance to the Greek border authorities by deploying an adequate number and composition of Rapid Border Intervention

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[85] ECRE CO7/1/2009/Ext/MDM, p. 9. See also Dikeç, M. 'The "where" of asylum', *Environment and Planning: Society and Space*, vol.27 (2009) pp. 186, 187.

[86] Cf. Amnesty International, *Spain and Morocco: Failure to Protect the Rights of the Migrants – Ceuta and Melilla One Year On*, 26 October 2006.

[87] Cf. Human Rights Watch, *Stuck in a Revolving Door. Iraqis and other asylum Seekers and Migrants at the Greece/Turkey Entrance to the EU* November 26, 2008.

[88] Regulation (EC) No. 863/2007 Article 5 (3): 'Members of the teams may only perform tasks and exercise powers under instructions from, and, as a general rule, in the presence of, border guards of the host Member State.'

Teams. Once deployed, they will be operating under the command and control of the Greek authorities. We will decide how many officers and what kind of technical means will be needed to effectively assist the Greek authorities in strengthening this external EU border and act swiftly to provide the assistance that this Member State has requested.'[89]

According to the Frontex Regulation[90] , consideration 1, Frontex acts upon the assumption that border control and management 'is a necessary corollary to the free movement of persons within the European Union and a fundamental component of an area of freedom, security and justice.' Article 1(2) explicates the aim of Frontex which is to 'facilitate and render more effective the application of existing and future Community measures relating to the management of external borders.' In a joint briefing, Amnesty International and the European Council on Refugees and Exiles point out that, '[i]n theory, "management" of operational cooperation in border control should be targeted at checking whether persons meet the entry requirements established by EU law, or are otherwise to be admitted to EU territory as international protection seekers. In practice, the coordination and facilitation role of Frontex is primarily concerned with Member States' objective to prevent migrants from reaching the EU's territory by irregular means.'[91]

In this context, it is worth considering that RABIT actually operates as a police force since in the majority of European countries the law enforcement authorities in charge of border controls are the police and/or military.[92] According to RABIT regulation article 5 (5-7) as amended, border guard officials who make up an intervention team 'may carry service weapons, ammunition and equipment' which 'may be used in legitimate self-defence and in legitimate defence.' As guest officers operate under the command and control of authorities who requested their assistance, it is important, as Carrera and Guild stress, to take the practices of border control by these authorities into account. With respect to Greece, it should be noted that the first instance asylum procedure is in the hands of police authorities who, according to the UN Special Rapporteur on Torture, 'lack the necessary capacities and expertise in accepting the large number of applications.'[93] The inhumane detainment of asylum seekers as documented by Human Rights Watch as referred above, substantiate this claim. Noteworthy, Greece's refusal to improve reception conditions for irregular immigrants in the light of recommendations the European Committee for the Prevention of Torture (CPT) has made from 1997 onwards, has led the CPT to resort to the exceptional measure of issuing a public statement on Greece. On March 15 2011 the CPT stated that the detention of irregular immigrants in Greece 'is unacceptable and could even

[89] Ilkka Laitinen as cited in Carrera, S. & Guild, E. 'Joint Operation RABIT 2010 – FRONTEX assistance to Greece's border with Turkey: revealing the Deficiencies of Europe's Dublin Asylum System', CEPS Paper in Liberty and Security in Europe, (November 2010) p. 4.

[90] Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

[91] Amnesty International and European Council on Refugees and Exiles, 'Briefing on the Commission proposal for a regulation amending Council regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) (September 2010), p. 9.

[92] Cf. Carrera & Guild (2010), p. 6.

[93] Ibid., p.13.

amount to inhuman or degrading behavior.'[94] To this should be added UNHCR's repeated criticism of the absence of functional and proper asylum procedures, with the result that refugee recognition rates in Greece are close to nil.[95] As to RABIT, concerns are compounded by the fact that Frontex, in deciding upon an urgent request, collects data so as to substantiate the request without, however, including information on the nationalities of immigrants who are prevented entry to EU territory. According to both the UNHCR and the Special Rapporteur on Torture, immigrants who attempt to illegally cross the Greece-Turkey border mainly come from countries on the top list of refugee- producing countries such as Iraq, Somalia, Iran and Afghanistan. Though Frontex agreed to include UNHCR in its decisions and operations, UNHCR was brushed aside in the first set- up of a Rapid Border Intervention Team.[96] By ignoring the nationalities and the concomitant potential protection need of immigrants, Frontex displays a glaring indifference to ensuring a proper procedure for those in need of international protection. This strongly increases the risk of violating the prohibition of *refoulement*. The picture colors even darker because of the fact that a critical assessment of Frontex's operations with respect to guaranteeing a right to seek asylum is virtually impossible, since Frontex can claim, as it has done before, 'that it is ignorant of whether any asylum applications were submitted during the operations as it does not collect data in this respect.'[97]

The coordination and operations of Frontex appear to be foggy, to say the least. And things even get worse. The legal framework of Frontex ensures that the decision- making power with regard to refusal of entry and/or return, is retained by the state who requested the activation of RABIT. In his clarification of Frontex's mission on the eve of the adoption of the RABIT regulation, Ilkka Laitinen stressed that the responsibility for the control of EU external borders lies with the member states, and that Frontex 'doesn't have any monopoly on border protection and is not omnipotent.'[98] At the same time, however, the amended Frontex Regulation increasingly extended the executive powers of the agency.[99] According to Amnesty International and ECRE, this 'creates a degree of ambiguity as to who

[94] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Public Statement Concerning Greece*, Strasbourg, 15 March 2011, doc. CPT/Inf (2011) 10.

[95] Cf. Carrera & Guild, p. 2. This shows the failure of the Dublin Convention, regulation343/2003 (EC) that determines the country of first entry to be responsible to examine an asylum claim. Cf. Guild, E. 'Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures', *European Law Review*, vol. 9 (2004), no. 2, pp. 198-218; Noll, G. 'Formalism v. Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law', *Nordic Journal of International Law*, vol. 70, (2001), nos. 1-2, pp. 161-182.

[96] Cf. Carrera & Guild (2010), p. 15.

[97] Amnesty International and European Council on Refugees and Exiles, Briefing on the Commission proposal for a regulation amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) (September 2010), p. 17.

[98] Ilkka Laitinen, *Frontex- Facts and Myths* June 11, 2007.

[99] Cf. Amnesty International and European Council on Refugees and Exiles, Briefing on the Commission proposal for a regulation amending Council regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) (September 2010), p. 9. For a critical discussion of Frontex and RABIT see also Fischer-Lescano et al., (2009), p. 258.

bears responsibility for the active border checks and surveillance tasks performed.'[100]

In this respect, it is important to note that Frontex operates in a grey zone beyond mere law enforcement as it is in practice mainly concerned with the prevention of the illegal entry of immigrants. For, the actions necessary for strengthening the EU external border clearly involve refusal or prevention of entry, forced return, and disembarking of immigrants upon interception. But since Frontex does not have the legal power to decide on this matters, the resulting ambiguity over responsibility makes it well-nigh impossible to challenge any such decisions.[101] Hence, Amnesty International and ECRE expressed their serious concerns that these legal ambiguities create 'a gap in accountability and potentially permit Member States to engage in border management with impunity.'[102]

Indeed, with the strengthening of the EU external border under the control of Frontex, the European Union faces a thorny dilemma: In the same blow as Frontex claims to strengthen the EU external border with a view to securing the EU democratic legal order, it runs the risk of deeply compromising that very order. For it is misleading to assume – despite Ilkka Laitinen's reassurances to the contrary[103] -- that Frontex merely engages in border enforcement. Though formally not given the legal power of decision- making, Frontex's decisions, instructions and actions in emergency situations do, in fact, produce legal effects.[104] Acting on discretion to avert an indiscriminate threat of illegal immigration, Frontex preserves and secures EU democratic legal order by means of suspending the values valid within that order and exempting itself from it.

In Chapter Four, it was argued that the constitution of democratic legal order comes about in the legal void that arises from the renunciation or suspension of existing law. The founding act, it was argued, anticipates the legal framework it seeks to bring into being, and that retroactively is to give the founding act its legitimacy. If successful, that is, the constitution of order is reliant upon what is constituted in order for it to be legitimate. To the extent that this is a legitimation in retrospect there always remains an element of factuality that sinks in the further existence of order, and which, recall, makes order fundamentally questionable and subjects it to an ongoing contestation.

But with Frontex mere factuality resurfaces. That Frontex acts beyond law and border enforcement does not turn it into an agency of lawmaking that engages in border constitution. The frontiers Frontex erects do not acquire legitimacy in retrospect, if only because Frontex is exempted from political and legal accountability before the European Parliament and the European Courts.[105] Neither enforcing nor constituting borders,[106] Frontex instead exerts a naked force that is devoid of law.

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[100] Amnesty International and European Council on Refugees and Exiles (2010), p. 11.
[101] Cf. Ibid., p. 12.
[102] Ibid., p. 4.
[103] Cf. Ilkka Laitinen *Frontex- Facts and Myths,* June 11, 2007.
[104] Compare Amnesty International and European Council on Refugees and Exiles (2010) p. 13: 'Even in the absence of a "legal act" produced by the Agency, a valid argument exists that Frontex gives instructions and takes decisions that produce legal effects.'
[105] Cf. Ibid., p. 13.
[106] To develop this argument I greatly benefited from Walter Benjamin's discussion of the modern police in his essay *Zur Kritik der Gewalt* (1921). According to Benjamin the ignominy of the police force lies precisely in

Frontex proves the assumption that democracy renounces violence to be false. Calling upon a police and/or military force to avert the threat of illegal immigration, the EU shows that democracy keeps violence in reserve as an option of last resort, whenever it faces an emergency situation that potentially damages democratic legal order.[107] The Rapid Border Intervention Teams under the coordination of Frontex, play on the infamous paradox of sovereignty. Exempting itself from the validity of the law so as to resort to all means necessary to avert the threat in order to secure the freedom of EU citizens, it is both inside and outside the legal order at the same time.

But the paradox of sovereignty, which results from the sovereign having the power to suspend the law, understands the sovereign's concern for its own being to be an unquestionable right. But precisely in securing this right by way of acting on the exception to the law, it deprives the sovereign's concern of its lawfulness, turning it into a mere factuality protected by a naked force.

Indeed, if, as said, Frontex runs the risk of deeply compromising the EU, it is because it turns it into a mere factuality that is to be strengthened and secured by an uncontrolled naked force that is exempted from legal and political accountability. In their critical assessment of the first RABIT deployment at the Greece-Turkey land border, Carrera and Guild, therefore, argue: 'Each person apprehended crossing the external border in Operation RABIT 2010, who indicates a claim for international protection, must be safeguarded from *refoulement,* provided with adequate reception conditions and have access to a fair and equal asylum procedure including a right to appeal if necessary. If Operation RABIT 2010 has the effect of short-circuiting these EU obligations and subjects people to *refoulement sauvage*, the EU will be shamed before the whole of the international community.'[108]

Importantly, Carrera and Guild implicitly draw attention to the tension between Frontex's objective (more security) and the values of the EU as expressed in the Charter of Fundamental Rights. Indeed, the indiscriminate exclusion of, and the force exerted over, immigrants ultimately part ways with law. Frontex is the inverted and perverted image of law. Operating in an exceptional situation of high pressure, aiming to prevent the illegal entry of immigrants, Frontex's actions are immediate, impatience, do not tolerate delay or distance, nor, for that matter, reflection, consideration, appraisal or deliberation. The more Frontex excepts and emancipates itself from law, the more an essential element of law comes to the fore. Frontex, that is, shows by default, that decision is essential to law.[109]

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the confusion of two aspects of power, i.e., its lawmaking and law enforcing capacity. Cf., Benjamin 1996, p. 242-243.

[107] The report *The Truth is Bitter But It Must be Told* by Pro-Asyl documents the use of violence exercised by the Greek coast Guard against asylum seekers and includes testimonies of severe human rights violations and torture (such as suffocating and drowning). As one victim of violence and abuse relates: 'When I arrived in Greece and the police beat me I thought, the police are the same everywhere. They did not respect us as humans, I don't know why. The police here are like in Africa, they know only violence, nothing else. That really got to me.'(Pro-Asyl, *The Truth is Bitter But it Must be Told. The Situation of Refugees in the Aegan and the practice of Greek Coast Guard*, October 2007, p. 10).

[108] Carrera & Guild (2010), pp. 15, 16.

[109] Indeed, according to Walter Benjamin law and violence, despite the essential and close relations between them, in the end crucially differ from each other as law, in contradistinction to violence, acknowledges the metaphysical category of the decision. Cf., Benjamin 1996, p. 243.

Decision takes and gives time. It takes time because law, as extensively argued in Chapter Four, does not foresee all possible future cases, does not contain information about its application, and does not inform how and when it is to be applied. We don't just enforce the law in the face of the potential refugee because at the very moment of his arrival we do not know whether his claim to protection is just or not; because we do not know beforehand whether his case constitutes a case of law, or should be excepted. Hence we give him time to lodge a claim by way of suspending the possible repercussions of his illegal entry. Hence we give him time to subsequently express his view, and relate all the relevant facts that are to substantiate his claim to protection. And if we decide upon his claim, we decide that he is in need of protection and shall be granted asylum, or should be excepted thereof. He either falls within the law or not, so if we decide his claim, we set the limits of law again and anew. And law, that didn't foresee in this particular case, this specific claim to protection, falls upon the case and folds back upon itself, asserting itself.

On account of the decision, boundary enforcement cannot be irreducibly derived from the norm; instead, there is time to redraw and reposit the border. But neither do we insist on our right to manage and control our border as we please, erecting frontiers without the support of existing law. By virtue of the decision, we enforce the border by making it, strengthen our borders by positing them again and anew. By virtue of the decision we give the refugee time and space while expressing our concern for our own being. Our sovereign concern, recall, stems from the fact that our being is never certain, never fully legitimate. The boundaries we draw, by reason of which we understand and determine our self, are not, for that reason, grounded in what and who we are; are not, that is, ever fully legitimated by that self that thus rises forth. Hence the need to refound our self, time and again, to draw the line again and anew.

The patient, well-informed, prudent decision constitutes the openness to the refugee who stands at the door, who appears at the threshold, and of whom we are not certain if he has a right to be here, while at the same time, it expresses the concern for our own being. The reception of refugees who come unexpectedly and are not invited, is as ambiguous as this. Distrust, hostility, indiscriminate exclusion, repression and violence without decision erase this ambiguity and replace it with the humbug logic in which it is either us or them who are going to drown.

5.6 Emplacing Refugees

The present section seeks to answer the question what happens once an asylum claim has been lodged and the procedure been decided in the refugee's favor.

An adequate understanding of the trying situation that ensues from the refugee's flight brings to awareness, I argued, what exactly he is searching for in claiming asylum. Clearly, the refugee flees because he fears for his life and freedom and is, therefore, no doubt seeking protection. Still, it would be reductive to limit asylum to protection against the threat to which the refugee is exposed. The legal understanding of the refugee is much more informative than that, providing the cues as to what asylum should entail, as it proceeds from the assumption that the

refugee lacks legal protection as a consequence of the flight from his homeland. According to Petra Catz, this sets the terms for international protection: 'Refugees are people who are on the move because of threats to their freedom or security. But moreover they are people, citizens, who have lost the full set of basic and political rights, and in most cases, also their social and economic rights. They lost their state, the institution which should provide protection, the legal structure which should bear responsibility for its citizens. Their lives are disrupted, and they should, at a certain moment, be enabled to rebuild and regain power over their own lives, with the prospect of 'a normal future' for themselves and their children. And if return to the country of origin is not feasible, then another state should provide them with their basic human rights. That, in the long run, is what protection should entail.'[110]

Indeed, the loss the refugee suffers is twofold: He has lost legal protection from his home government in the same blow that he has lost *his own country*. The claim to asylum should, therefore, be understood against the backdrop of the refugee's displacement. In claiming asylum, the refugee claims a new place that he can call his own again. Asylum, therefore, entails the anticipated possibility of becoming rooted again. Indeed, implicit in the explicit purpose of the Refugee Convention to restore the legal person of the refugee, is that asylum entails both protection and the place of protection. Otherwise still, protection requires the emplacement of the refugee.

This challenges a prevailing and well-documented assumption about the refugee experience. In her extensive studies on the construction and understanding of the refugee experience, Liisa Malkki demonstrated the general assumption that being a refugee involves an irreparable loss of tradition, culture, a sense of belonging and identity. Strikingly, though, the conclusion attached to this inverts the argument I have developed, as it is generally assumed that the refugee's uprootedness makes him experience the host country as unfamiliar, at times even threatening, but in any case, as a place where he is ill at ease and does not belong. Hence, Malkki argues: 'The "making strange" of the asylum country often corresponds to the assumption that the homeland or country of origin is not only the normal but the ideal habitat for any person, the place where one fits it, lives in peace, and has an unproblematic culture and identity.'[111]

Of course, this general assumption fits the very concept of *de facto* statelessness which is believed to identify the refugee problem, and presupposes that refugees, at the end of the day, ought to be there where they supposedly belong, and not here where they are out of place.[112] Hence, Nevzat Soğuk argues: 'The refugee is given a name only to be deprived of his ability to participate fully in the polity in which he finds himself … 'To exist again in more than a name', to have 'work', 'home',

[110] Catz (2003), p. 51.
[111] Malkki, (1995), p. 509. Cf. also Spijkerboer, T. 'De boom, de mieren en de giraffe' in: Spijkerboer, T. & Van Walsum, S. *Grensoverschrijdingen. Opstellen over Vreemdeling en recht,* Utrecht: Nederlands Centrum Buitenlanders 1997, p. 22; also Kostakopoulou &Thomas (2004), p. 5; Huysmans (2000), p. 763; Van Houtum, H. & Pijpers, R. 'The European Union as a Gated Community: the Two-Faced Border and Immigration Regime of the EU.' *Antipode* (2007), pp. 295, 296; Van Houtum, H. 'The Geopolitics of Borders and Boundaries.' *Geopolitics*, vol. 10 (2005), p. 676.
[112] Cf. Malkki (1995), p. 509.

and 'decisions to take', the refugee must return 'home', that is, he must have his territorial ties reestablished …'.[113]

Indeed, the veiling of the refugee's displacement as achieved by *de facto* statelessness, and substantiated by the presumed coincidence between 'home' and country of origin and/or nationality, no doubt caused return to take priority. In their critical study of the effects of (Western) states abdicating their responsibility to protect to the UNHCR, Harell-Bond and Verdirame demonstrate that among the three durable solutions of integration, resettlement and repatriation, the latter came to predominate, causing the other two to fall out of favor. They argue: 'The issue of repatriation came to dominate refugee policy at every level and had an impact on refugee protection. Since the 1980s, UNHCR has regarded repatriation as the preferred solution, an approach crystallized later with the high commissioner's announcement that the 1990s be 'the decade of repatriation.' The call for repatriation has permeated UNHCR's work since then, and repatriating large numbers is regarded as an institutional achievement … Repatriation is premised on the notion that refugees have an eternal and visceral tie with the country of origin – 'home'-- the place to which they will always belong.'[114]

The priority of repatriation strongly impacted upon the temporary nature of protection and asylum, turning countries of asylum into 'waiting rooms before repatriation', while virtually giving up on integration, as Harell-Bond and Verdirame also argue. Indeed, the current debate on a different regime of (humanitarian) Temporary Protection with a view to return, no doubt took its inspiration from the already established practice and institutionalization of repatriation as the preferred durable solution to the refugee problem. As argued in Chapter Two, Temporary (Regional) Protection with a view to return fully brings to light the consequence of the identification of the refugee problem as a problem of *de facto* statelessness.

Admittedly, research, debate and proposals on Temporary Protection remain moving targets, as the debate is still in its initial phase, and no agreement has been reached on the role and function of Temporary (Regional) Protection within the international legal framework of refugee protection. Still, it is safe to assume that the defense of Temporary (Regional) Protection, with a view to the refugee's return 'home', exceeds the limited definition thereof in the EU Temporary Protection Directive (2001/55/EC), that views Temporary Protection as a regional tool to respond to a sudden mass-influx of refugees. The Directive, no doubt, considers Temporary Protection to be complementary to Convention-based protection. But, according to Hathaway, Temporary Protection neither complements nor replaces the Convention, but rather, constitutes a 'new paradigm in refugee law', and should be considered to be a way of implementing the 1951 refugee Convention.[115]

I strongly disagree with Hathaway, and believe that, even though Temporary Protection at certain moments can take priority for all sorts of practical reasons (as intended with the EU Temporary Protection Directive), this priority should not spill over to the theoretical level of thinking about refugee law and protection. Repatriation or return is what it is: a durable solution among the others, not *the* way to implement the Refugee Convention. In fact, I believe that if Convention- based

[113]Soğuk, 1999, p. 54.
[114] Harell-Bond & Verdirame 2005, p. 335.
[115] Refer back to Chapter One.

protection is contingent upon the refugee's emplacement, implying that asylum anticipates the possibility that the refugee becomes rooted again, the integration of refugees in host societies should be given serious attention, once again.

Granting refugees asylum, understood in the aforementioned sense, therefore, bears upon the wider issue of the political and legal integration of non-nationals within the EU, and should find its way to the EU Long Term Residents Directive (2003/109/EC). The LTR Directive aims to ensure a fair treatment of third-country nationals legally staying within the EU and lays down that their status should approximate to that of member-state nationals. In its Proposal for a LTR Directive of March 2001,[116] refugees were included, whereas beneficiaries of subsidiary protection were not. Eventually, however, it was decided that persons afforded international protection be removed altogether from the scope of the Directive. Importantly though, in June, 2007, the EC published a Proposal to amend the LTR Directive with a view to include refugees within its scope, aiming to offer them legal certainty about their residence within the EU, and granting them rights comparable to EU citizens' rights after five years of legal residence, calculated from the moment of the application for protection. The inclusion of refugees within the scope of the LTR Directive, which is presently being negotiated[117], responds to the concept of asylum I have developed, and reevaluates integration as a durable solution. Moreover, it would prove that EU member states not only pay lip service to the 1951 Refugee Convention, but actually and effectively take seriously their own repeated declared commitment to the Convention.

But the anticipated possibility of an own place that inheres in the grant of asylum, does not just pertain to Convention refugees. It is valid, as well, for persons granted subsidiary protection resulting from the prohibition of *refoulement,* or from the existence of a serious threat to their life because of indiscriminate violence in situations of internal or international armed conflict.[118] As to the current state of affairs, however, subsidiary protection is inferior to Convention-based protection. The existence of two separate protection statuses is not self-evident, as is evidenced by the EC Communication Towards a Common Asylum Procedure and a Uniform Status of November 2001,[119] which recommends that the rights of those granted subsidiary protection should equal the rights of the Refugee Convention. It is not suspiring, therefore, that the inequality between different persons afforded international protection has been subjected to debate, and has been heavily criticized for a variety of reasons. Scholars in refugee law, such as Durieux, Noll and Spijkerboer, are of the opinion that the need for a regime of subsidiary protection arises from the restrictive interpretation of the refugee definition, and its strict focus on the criterion of single-out (something the above- mentioned EC Communication explicitly denies). Consequently, they argue that persons now offered subsidiary protection are to be considered as refugees according to the

[116] 2001/C 240 E/13.
[117] Cf., Peers, S. 'Legislative Update EU Immigration and Asylum Law 2010: Extension of Long-term Residence Rights and Amending the Law on Trafficking in Human Beings', *European Journal of Migration and Law*, vol. 13 (2011), pp. 201-218
[118] Refer back to Ch. 1.
[119] COM (2000) 755 Final.

1951 Refugee Convention.[120] As Spijkerboer argues: 'The necessity of drafting separate legal texts for subsidiary protection is one created by the restrictive interpretation of the term refugee. In fact, we are reinventing the wheel. The necessity of drafting separate legal texts for subsidiary protection is a political one, not a legal one.'[121] Noll seems to share in this view, arguing that: 'Subsidiary protection is what happens to states that manipulate obligations under the Geneva Convention.'[122]

ECRE takes its concern with respect to two different and unequal protection statuses into a different direction, arguing that both groups of persons in need of international protection share in the same needs: 'It is hard to find an objective justification for the situation established by the current text of the Qualification Directive, where a person fleeing serious harm can be afforded with fewer entitlements than a refugee fleeing persecution. This approach enshrines a vision of subsidiary protection as a lesser, temporary form of protection, which is clearly not its purpose. As stressed by the European Parliament in the Explanatory Statement included in its 2002 report on the Commission proposal, both statuses are meant to be "complementary rather than hierarchical". There is no indication whatsoever that a well-founded fear of being persecuted will last longer than a risk of serious harm. The needs of all international protection beneficiaries are equally compelling and, therefore, should be met with the same rights.'[123] Consequently, ECRE welcomes the EC Proposal to Recast the EU Qualification Directive.[124] The Recast Proposal, also presently under negotiation, introduces the concept of 'beneficiaries of international protection', which substitutes one legal status for the existing two. The alignment of the rights granted to refugees and persons granted subsidiary protection *de facto* results in one uniform status.[125]

Importantly, the EC proposal to amend the LTR Directive, as discussed above, aims to include in its scope 'beneficiaries of international protection', thus granting legal residence rights for both refugees and subsidiary protected persons. If both Proposals to amend the LTR Directive and Qualification Directive are accepted, the legal position of refugees would certainly be improved. Refugees would see their legal person be restored, hence, the amended Directives would implement the Refugee Convention by granting refugees a legal place, enabling them to enjoy their rights and freedom, and rebuild their lives. Importantly, it will give effect to the right to asylum as enshrined in the Charter of Fundamental Rights of the European Union.

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[120] Cf. Durieux, 'Salah Sheekh is a Refugee. New Insights into Primary and Subsidiary Forms of Protection', Refugee Studies Centre Working Paper no. 49, October 2008; Boeles & Fernhout in NJB, aflevering 20, (1999).

[121] Spijkerboer, T. 'Full Circle? The Personal Scope of International Protection in the Geneva Convention and the Draft Directive on Qualification' in Constanca Dias Urbano De Sousa, Ph. De Bruycker (eds.) *The Emergence of a European Asylum Policy*, Bruxelles: Bruylant, 2004 p. 175.

[122] Noll, G. 'International Protection Obligations and the Definition of Subsidiary Protection in the EU Qualification Directive' in Constanca Dias Urbano De Sousa, Ph. De Bruycker (eds.), *The Emergence of A European Asylum Policy* Bruxelles: Bruylant, 2004 p. 193.

[123] Comments from the European Council of Refugees and Exiles on the European Commission Proposal to recast the Qualification Directive (March 2010) p. 12.

[124] COD/2009/0164.

[125] Comments from the European Council of Refugees and Exiles on the European Commission Proposal to recast the Qualification Directive (March 2010) p. 4.

6

Conclusive Summary

This book has been devoted to critically assessing the international response to the refugee question. It took as its starting point the tension between the international community's proclaimed commitment to protect refugees and the actual practice of protection. Somewhere between the lofty aspirations to assure refugees the exercise of their rights and freedoms and current asylum policies, the system of refugee protection is falling apart. I have tried to trace down the origins of this breakdown. I deemed it necessary to refresh our understanding of the stakes involved in refugee protection. The first question of this thesis, i.e., what asylum is and amounts to, has shed a new light on the refugee problem. This conclusive summary recaps some of the most important findings.

I somehow feel that in the closing pages of this inquiry into asylum we should leave refugees the last word. I will therefore introduce two refugees whom I met during my job as a volunteer at a local department of the Dutch Refugee Council some years ago. My experience with these two refugees carried the germs of this academic study.

First, let me briefly recount my experience with a young girl from Somalia who belonged to the minority group of the Reer Hamar. She applied for asylum in the Netherlands as an unaccompanied minor. Her misery is surely a story about the trickery of time. She had to wait six years before a first decision was taken on her application. At that time, the Dutch government, aware of the fact that long and overdue procedures harm people, decided to grant a general amnesty to asylum seekers whose procedure already took six years, and who had not yet received a first decision. Had this girl applied for asylum two days earlier than she actually did, the amnesty would have applied to her. When she was finally rejected as a refugee, the decision came too soon. A few days later, the European Court of Human Rights decided on the well-known Salah Sheekh case and ruled that membership of the Reer Hamar was, in itself, a sufficient reason to be granted protection under article 3 of the European Convention on Human Rights. By that time, however, the girl had already disappeared. Her boyfriend, whom I came across in her apartment, told me that she had made herself invisible out of fear of being returned to Somalia.

To this very day, I am certain that if she had lodged an appeal, the court would have ruled in her favour. But I also have to admit that the question, whether or not she qualified for protection, was not the sole reason why I spent a considerable amount of time on her case. I just happened to like her. She was not allowed to go to school nor given the opportunity to learn the Dutch language. As the bigmouth that she was, she found this incredibly stupid. So she bought a dictionary and started working as a volunteer in an old people's home. Caring for the aged, she learned the language. I really admired her for her strength and swagger and the determinacy with which she, just like that, started to live among us and participated in Dutch society. Besides, apart from her scarf, we happened to like the same kind of clothing, so we shared information where to buy the fanciest dresses in town and we always had a good laugh together. I just thought she deserved to be here simply because of who she was.

I also really liked the young boy from Ethiopia. He also applied for asylum as an unaccompanied minor. But his story made me aware of the complexity of the refugee question. Or more precisely still, he made me realize that I did not understand it. At a very young age he had lost his mother. Her death was unrelated to the enmities between Ethiopia and Eritrea. But, when he was an adolescent, his father was arrested as he was originally from Eritrea. After the arrest, the place of detention was kept secret (if he was detained at all) and the boy never saw his father again. The immigration authorities deemed this to be incredible and were of the opinion that the boy just made up the story of his father's Eritrean origins, as this would suit him in his procedure, given the fact of the recent war between the two countries. But cynically, when the boy, meanwhile a young man, received the return decision, he was informed that he should go to both the Eritrean and Ethiopian embassies so as to improve the chances for his actual removal from Dutch territory. After all, he grew up in Ethiopia but claimed to have family ties in Eritrea. However, it was a well-known fact, confirmed by UNHCR, that people from Ethiopia with Eritrean origins, upon return to Eritrea would be detained in camps from where they would be deported to Ethiopia. In its turn, Ethiopia would contain these people in camps from where they were deported back to Eritrea, and so on. Those people, UNHCR declared, should be considered to be *de facto* stateless. If this young man returned to wherever it was he was supposed to return to, he would be subjected to an inhuman game of human Ping-Pong. It struck me dumb that even though this was a well-known fact, it did not constitute a reason to offer this man a leave to stay. The only way out for him was to prove that neither Ethiopia nor Eritrea was willing to take him back. If he could prove that he could not be removed for reason beyond his control, the authorities might decide to grant him a leave to remain for that reason. Until then, however, only a few Palestinian stateless persons actually succeeded in demonstrating that there was no single state on earth which would be willing to take them in.

Fortunately, the general amnesty did apply to him. But by that time he was only a shadow of the boy he was before, when full of energy, highly motivated to work and learn and with a contagious joy in life.

Writing this book, this girl and boy were constantly at the back of my mind. And it turned out that my experiences with them were more closely connected then I could possibly foresee at that time. With the girl, I had the unsettling (and

embarrassing) experience that I thought she was deserving of protection because she liked me and was a bit like me. The boy made me aware of the difference between *de facto* and *de jure* statelessness, between refugees and stateless persons. And the one experience is not without relation to the other.

Drawing on empirical analyses by Thomas Spijkerboer and Jan Blommaert, I argued that the refugee's affirmation of the receiving polity's identity is a precondition for the conferral of refugee status. The asylum seeker has to live up to the expectations and normative views that preponderate in the hosting community in order for her account to be deemed credible and a claim to protection thus to be successful. The 'real' refugee does not challenge the identity of his hosts. As the terms under which an asylum seeker is recognized as a refugee are set up in advance, and the asylum seeker has to know how to play these terms, he rather seems to affirm the receiving polity. He or she has to like us and be a bit like us.

Affirming the hosts' identity, however, unavoidably entails a neutralization of the challenge inherent in a claim to asylum and a repression of the strangeness of the refugee. With respect to this strangeness, recall from Chapter Two that the years preceding the 1951 Refugee Convention came close to grasping it. When, in 1921, the Social and Economic Council was called upon to define the refugee problem it took notice of a Communication of the International Refugee Organization (IRO) which stated that the refugee was an alien in each and every country. Worse still, he was not even an alien as the alien's option of last resort, i.e., return home, was not open to the refugee. The refugee was therefore considered to be an anomaly in international law.

The Communication of the IRO expressed that the refugee is not simply a foreigner belonging to another state. Instead, it intimated that the refugee was a stranger on account of his displacement, taken in the strong sense of the lack of an own place. If the refugee is a stranger, he is the stranger par excellence. Driven out of his homeland and forced to live outside the bonds of nationality, the refugee, as Arendt would say, belongs nowhere in this world.

But as demonstrated in both Chapter Two and Chapter Five, the refugee's displacement gradually receded in the background and was eventually pretermitted altogether, as the lack of an own place exclusively came to be understood in terms of the formal absence of nationality. The fundamental dilemma of an individual's right to live somewhere was shifted from the refugee problem to the problem of statelessness.

This lack of regard for the refugee's displacement is reaffirmed and resurfaces whenever a people's identity serves as a point of departure for decisions in matters of asylum. By virtue of confirming and reinvigorating a people's identity, the real refugee is a good refugee. Being the good refugee that he is, he is in no position to demand anything, as he must cleanse himself from the suspicion that he takes advantage of the people's hospitality. But from the outset, it is feared that the refugee *is* taking advantage, that he *is* deceiving his hosts, as they sense there is some ulterior motive on the part of the refugee. This ulterior motive is, of course, the refugee's intention and determinacy to take up a place of his own within the hosting society.

In this respect, a short story by the French novelist and philosopher Maurice Blanchot called *The Idyll*[1] (1935) is worth mentioning. *The Idyll* marvellously depicts the laborious relation between the stranger (indeed the stranger par excellence) and his hosts, by showing that the very simple question of the stranger, 'Let me become the man I was before', is experienced as a sardonic threat by his hosts. For the stranger's request would only be met if he regained his freedom and were allowed to settle as a free man in the city where he would be living among his hosts. In *The Idyll* the stranger is received in the hospitable home which is the place of welcome for strangers. The hospitable home is located at the skirts of the city which has banned words such as 'waiting zone', 'prison', and 'seclusion' from its lofty language. The people of the city are proud to have this home as it allows them to be good to strangers. And the stranger has to affirm their justness, their kindness, has to believe in their idyll without being in a position to demand anything, not even his freedom. Upon his arrival the stranger is welcomed by the lovely, charming young woman Louise who is married to Pierre. Together they run the hospitable home. Immediately Louise introduces the stranger to her husband, flattering her love by proudly saying: 'He's good; You'll like him, everyone does.'[2] But as the story unfolds it becomes clear that Louise's words are not describing a warm atmosphere of respect and friendship but instead function more like a warning: like us or you will upset the order of the home. The stranger understands the warning and is constantly toadying to his hosts. He only says what they desperately want him to say, namely that their life is a happy one. He has to like them, has to believe in their happiness so that they themselves can believe in it again. Still the hosts cannot but distrust the stranger as they fear that he is secretly planning his escape to the city. Because of this much-dreaded abuse of the stranger, the hosts keep after him. *The Idyll* perfectly sketches the stranger's dilemma: the stranger has to affirm his hosts, he has to like them and be like them while is under the constant suspicion that he is deceiving them.[3] The stranger from *The Idyll* very well captures the dilemma: 'You'll learn that in this house it's hard to be a stranger. You'll also learn that it's not easy stop being one.'[4]

The stranger has to be compliant, has to be grateful and is barred from speaking the forbidden words that would expose what the hospitable home truly is: a penal institution, a waiting zone where the stranger is suffering as he is not free and where his life is put on hold. Apparently, the home is the only 'place' the people of the city are willing to offer to strangers. Eventually the stranger speaks the forbidden words: 'You have treated me brutally … A dog, a swine has the right to more respect. I'll remember your hospitality.'[5] These words give the initial impetus

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[1] Blanchot, M. *Vicious Circles. Two Fictions and 'After the Fact'* (translated from the French), Barrytown, New York: Station Hill Press 1985.

[2] Ibid., p. 3.

[3] The dilemma also becomes clear from the name Louise gives to the stranger: Alexander Akim. In her perspicuous reading of *The Idyll* Sarah Kofman reveals the meaning of this name by drawing on etymology: '*Alexander*: the man of the outside whose coming disrupts the harmony of the community; the trouble maker, the breaker of laws, the violator of treaties who *cannot keep his words*…Alexander *Akim*: the exile, the wretch, the vagabond whom the laws want to arrest, immobilize – to turn away from the outside – though it can only fail since Alexander is, and will remain, the man of the outside.' (Kofman, S. *Smothered Words* (translated from the French), Evanston: Northwestern University Press 1998, pp. 20, 21).

[4] Blanchot 1985, pp. 25, 26.

[5] Ibid., p. 9.

to hosts' certainty that the stranger *is* ungrateful and *is* abusing their system of hospitality. When the hosts finally know for sure that the stranger was planning his escape to the city, they punish him for this criminal act. The stranger is sentenced to the inhuman ordeal of flogging. After the death of the stranger all is quite as well as it was before in this beautiful land.

The stranger's dilemma from *The Idyll* is the refugee's dilemma as well: he has to conform to the values, norms, expectations and beliefs of the receiving polity while it is almost impossible to skirt the suspicion that he is abusing the system. Today, the fear that refugees might take up a place of their own among us is fostered by increasing numbers of immigrants who enter and settle in our communities without our prior consent. Seemingly willing to take refugees in, we mistrustfully haunt down the traces of their intrusion and abuse, eventually trying to repress these by keeping refugees at a distance, either by secluding them from the normal order of things or trying to prevent them from arriving at all. Indeed, driven to the limit, the real and good refugee is a refugee who has to be protected elsewhere.

It comes as no surprise, therefore, that a regime of temporary regional protection, which I discussed in Chapter One, gained so much attention from both politicians and academics. Under the pretext of preventing abuse and embanking illegal immigration while being good to refugees, it tries to make work of protecting refugees elsewhere. But as argued in Chapter Two, there is another reason as well why the exploration of temporary protection deserves special attention: It fully brings to light the consequences of the lack of regard for the refugee's displacement. This lack of regard has caused the identification of the refugee problem as a problem of *de facto* statelessness. The concept of *de facto* statelessness effaces the strangeness of the refugee, veils his displacement and levels down the challenge inherent in a claim to asylum. Ultimately, it justifies the claim that refugees, at the end of the day, belong 'there', not here. To be sure, this stubborn presupposition is not only expressed in the exploration of a regime of temporary protection; it is also reflected by the exclusion of refugees from the EU Long Terms Residents Directive.

But the disruptive force of the refugee's displacement, which calls into question that we live in a common world, is bound to recur. It resurfaces every time return 'home' proves to be infeasible. Then it becomes clear that the 'there' where the refugee supposedly belongs is no longer a qualified somewhere determined over against a particular here. The 'there' instead loses its determinacy and turns into a 'no matter where as long as it is not here.' Put even more strongly, the 'there', which is a 'no matter where', collapses the non-existent homeland of the refugee into the absolute non-place of the refugee camp. The refugee camp, I argued, marks the recurrence of the refugee's strangeness, as it gives a spatial arrangement to his or her displacement.

Note however, that strangeness hits back on us, as well. And it hits back hard. For refugee camps do not even come close to restoring the legal person of the refugee. Refugee camps seriously put doubt on our proclaimed belief in human rights and our commitment, rehearsed in both the EU Qualification Directive and the EU Charter on Fundamental Rights, to protection obligations under the Refugee Convention.

I repeat once more my agreement with Harell-Bond. While she acknowledges that mistakes will, sadly, always be made when we respond to refugee crises, the refugee camp is a mistake we cannot afford: '[S]ome mistakes are inevitable. Others are not. And of these, the most dangerous is our blind reliance on camps and our fixation on repatriation.'[6]

Establishing a link between refugee camps and the fixation on repatriation, Harell-Bond intimates that there is a pressing need to rethink the basis of our asylum policies. To my mind, a prerequisite thereto is a refreshing of our understanding of the plight that befalls refugees upon fleeing. Taking my cue from Arendt, I argued in Chapter Three that the cardinal point of having lost state protection is the loss of a place in this world from where one relates to oneself and others. Indeed, the sticky situation in which the refugee finds himself is that he belongs nowhere in this world. The experience of being nowhere in this world is the experience of the *apatride*, the one without a fatherland. And it is this experience, Améry reminds us, that brings to awareness that the human being needs a fatherland, a country of his own: 'Denn der Mensch braucht Heimat. Wieviel? … Er braucht viel Heimat, mehr jedenfalls, als eine Welt von Beheimateten, deren ganzer Stolz ein kosmopolitischer Ferienspaß ist, sich träumen läßt … Was bleibt, ist die nüchternste Feststellung: Es ist nicht gut, keine Heimat zu haben.'[7]

Indeed, with respect to rethinking the refugee problem, the most important finding of this thesis is that the strict division between refugees and stateless persons is untenable on a conceptual level. Statelessness is not merely a technical issue. As Van Waas stresses, it also and above all reflects a severe human dilemma for the person concerned: Where does he have a right to live? But if it is accepted that statelessness entails more than the formal absence of nationality but also amounts to the desperate experience of lacking an own place, it can be argued that the quandary of statelessness is not, by definition, excluded from the refugee problem. And if we accept this, we are better equipped to clear the haziness that surrounds the concept of asylum. The notion of asylum, I have argued in Chapter Five, acquires its sense against the backdrop of the refugee's displacement. Coming from elsewhere, the refugee, in claiming asylum, claims a place of his own where he, not unlike the stranger of Blanchot's parable, can be the man he was before.

Indeed, if, as was argued during the failed Conference on Territorial Asylum, asylum entails 'something more' than protection against *refoulement,* it is because asylum not only refers to protection but also to the place where protection is offered. If the Refugee Convention is still relevant today it is because the protection and the rights it affords to refugees are contingent upon the legal emplacement of refugees within hosting societies. In the same vein that the grant of a status of a stateless person is a stepping-stone to nationality, as UNHCR recently claimed, so also can the grant of refugee status be a stepping-stone towards naturalization and integration. Secluding refugees from the normal order of things, setting them aside from our societies on the assumption that return will always be a prospect in view, is virtually to abandon the Convention and its aspirations. Asylum entails the anticipated possibility of becoming rooted again, which would be given a

[6] Harell-Bond (1994), p. 20.
[7] Améry 1970, p. 76.

practical meaning if refugees were to be included in the EU Long Term Resident Directive. It would deprive repatriation and/or return from its predominance which is taken for granted today, and assign the place proper to it, i.e., as *a* durable solution next to integration. It is important to keep in mind that this argument is not only relevant for refugees who also happen to be stateless. It holds for all refugees. The recommendation of the Council of Europe 'to treat *de facto* stateless refugees as though they were stateless *de jure*'[8] supports this view.

This refounding of the concept of asylum set the scene for the second question of this academic study: Why would we, as members of democratic polities, care? Whence the political will to treat refugees in good faith and comply with international obligations to grant asylum?

In Chapter Three, I embarked upon this question. I proceeded from Arendt's invocation of the right to have rights, which is not so much an easy solution to the refugee question but, rather, expresses the fundamental dilemma refugees and democracies face in facing each other. This dilemma derives from the unavoidable asymmetry between refugees and the members of receiving polities, raising the question how, if at all, refugees can claim a right to have rights and why, if at all, this claim would register. The right to have rights is a claim at the behest of the displaced person who has been deprived of his legal and political identity and is suffering from the abstract nakedness of being nothing but human. People who are 'forced to live outside the common world', Arendt says, 'are thrown back, in the midst of civilization, on their natural givenness.'[9] Forced to live outside the common world in which each individual has a place of his own, the right to have rights is a claim to belong to a political community and to live among equals who mutually grant themselves rights. But if, in modern democracies, rights are the outcome of the joint political action between the members of a polity, how can the refugee, as a non-member, claim a right to belong? It's important to bear in mind that the dilemma works two ways. For the refugee radically calls into question 'the assumption that we can produce equality through organization, because man can act in and change and build a common world, together with his equals.'[10] Arendt's trenchant insight into the refugee dilemma is that the refugee 'breaks into the political scene as the alien which in its all too obvious difference reminds us of the limitations of human activity – which are identical with the limitations of human equality.'[11]

To scrape off some of the sharp edges of this dilemma, I turned to Benhabib who elaborates the notion of a right to have rights within the broader context of immigration. I demonstrated that Benhabib seeks to mitigate what Arendt cast as a threat to our political life by arguing that the fracture between a universal humanity and the common world of equals is constitutive of democracy itself. This fracture warrants democracy's openness to 'the others' who bring with them foreign contents of experience that show that the 'universal' and the 'human' can be given a different body, a new sense.

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[8] Council of Europe Recommendation 564 (1969).
[9] OT, p. 302.
[10] Ibid., p. 301.
[11] Ibid., p. 301.

I took issue with Benhabib for two reasons. First, I argued that Benhabib makes a people's identity, in the sense of idem-identity, the starting point for her theory on the right to membership. But in doing so, she does not tackle the issue of the *right* to membership, but offers an account of the cultural integration of already settled immigrants. She thus fails to see that the position from where the refugee challenges a receiving polity crucially differs from the position of the settled immigrant. Secondly, Benhabib's recourse to a moral universalism, which is the driving force behind democracy's openness and which establishes a moral reciprocity between 'the others' and a receiving polity', does not solve the quandary. In fact, it makes it even worse. For the assumed moral reciprocity hides from view that the decision to include and/or exclude is always taken from within with the effect that 'the other', at the end of the day, faces a decision with which he may not agree. Benhabib does not come to terms with the dilemma the right to have rights reflects. Instead, she spirits it away. And because of that, her theory does not offer a compelling argument to grant asylum.

Chapter Three ended with a discussion of Honig. What attracted me in her argument, and what continues to attract me, is that it adumbrates a wholly different and radical democratic response to the ever- increasing numbers of displaced and uprooted people who, as Arendt says, 'threaten our political life.'[12] Honig's tart response dovetails into a political care for the collective self of democracy and the right to have rights of displaced, uprooted, excluded, marginalized and irregular people. This political care for the people it*self* dissuades from taking repressive and violent action and deploy undemocratic means to turn the threat and stem the flows. It might incite a hyper-legalistic critique of current practices of exclusion, but also calls for radical political action that claims new rights for different groups of people. Either way, it projects a people into the future where it has to clean up the mess it made in fighting emergencies and containing security threats, playing the paradox of politics as it imagines a new world which it seeks to bring into being while acting as if this world already existed. This was exactly what the lawyers did who defended the rights of the Haitian refugees at Guantanamo Bay which was discussed at length in the third chapter. They knew their clients would not profit from existing aliens law. The lawyers, thus, defended the rights of the refugees which they both pursued and presupposed. The catchword in their success – the refugees were released from the detention centre and granted access to the United States – is no doubt proximity. Numerous US Citizens ranged themselves on the side of the detained refugees, not on the balmy assumption that they 'are all humans', but because of the shared commonalities between them and the refugees. They made a stance for the refugees' rights because the Haitians were in one way or another close and near to them. And, in doing so, they brought a different We to the democratic scene; a different and other We that refuses the harsh, inhuman and unjust regime to which people are subjected if they try to access the United States and file for asylum, simply because, as Honing would say, they are there.

Obviously, however, they can be as near as they can be in a geographical sense, yet not register in a political sense. Therefore, in Chapter Four, I continued my quest for an answer to the question why we would care for refugees? To answer it, I sought to rethink the concept of popular sovereignty. I joined the argument made

[12] Ibid., p. 302.

by Van Roermund that popular sovereignty hinges as much on the reflexivity of the We (articulated as a plural self) as on the much more received view that it entails the identity of the rulers and the ruled. Therefore, the relevant question with respect to popular sovereignty was: What does it mean for a We to exist as a self? Taking my cue from Heidegger's exposition of human being as Dasein, it was argued that to be a self means to make one's own what is given (facticity). Consequently, the plural self, which is the hallmark of the sovereign right of a people to determine itself, is not an *a priori*. Rather, the self emerges from the exposure to, and identification with, the world in which the We always already finds itself. Hence the plural self is not the ground of sovereignty. Rather, sovereignty is grounded in a fundamental lack of ground, as the plural self is essentially elusive, slips away from every representation, every identification by virtue of which the We determines and establishes itself. To be a self is the radical experience of one's own absence, one's own not-being. It is this possibility of absence and not-being - which inheres in the We from the moment it started to live together as a people - which makes a people concerned for its own existence. From the viewpoint of reflexivity, popular sovereignty thus came into view as a people's concern for its own being.

Then, I argued in Chapter Five that, given this concern, the appearance of the refugee carries a meaning for the polity which is crucially different from the meaning the immigrant brings to it. Whereas the appearance of the latter plays on the tensions between the actual We and a possible We, the refugee exposes the polity to the possibility of its non-existence. Immigrants lay bare the possibility of a different order; refugees confront the polity with the possibility of no order at all.

I am not saying that the polity *needs* refugees to be aware of its own finite existence. To say that the polity needs the refugee in this way is to misinterpret the appearance of the refugee in calculable terms, and draws it within the ambit of a people's concern. The point is, rather, that the very arrival of the refugee is critical towards this concern in the most radical way, as it exposes that this concern is much more *de facto* than it is *de jure*. The more the status of the refugee as 'wherever' is confirmed, the more this factuality becomes real. Countering the refugee's 'wherever' by granting asylum, the people takes seriously the concern for its own being by dealing with the ambiguities at the origins of its own existence. Indeed, malevolence, distrust and hostility towards refugees erase a people's own ambiguous self and turn its identity, as well as the 'right' to set up this identity, into an irresistible fact. By contrast, a people's concern for its own precarious and vulnerable being, attunes it to the moods of modesty in which it approaches refugees with benevolence and good faith.

Throughout this book, a distinction was made between refugees and immigrants. However, I do believe that a polity's response to the issue of irregular immigration can benefit, as well, from the argument I have developed. Indeed, it is time to rethink the basis of our migration policies, not only because the grant of asylum is always preceded by the unauthorized border crossings of potential refugees, but also because refugee protection always takes place within a certain climate, and the current mood that has taken hold on immigration has certainly proven to be detrimental to refugees. This study on refugees might be seen as a kick- off of a broader analysis of the interrelations between refugees, irregular immigrants and stateless persons.

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Abstract

On the day of writing the final touch of this thesis it is exactly sixty years ago that the Convention Relating to the Status of Refugees was adopted. To the present day, the 1951 Refugee Convention is the bedrock for protecting persons who are vulnerable in every aspect of their lives as they no longer enjoy any form of legal protection. This lack of protection befalls a person upon fleeing his own country; as soon as the refugee crosses the territorial borders of his own state he is driven outside the legal bonds of protection that connect him to the home government. The Refugee Convention addresses this lack of protection the refugee is suffering outside his own country. The key element of the international refugee protection regime is constituted by the prohibition of *refoulement* which prohibits states to return a refugee to a territory where he risks persecution or other serious harm. But Convention-based protection is not merely negatively determined. Given the purpose of the Refugee Convention to assure refugees the widest possible exercise of their rights and freedoms, protection also clearly has a positive aspect that enables refugees to continue their lives in safety and dignity. This positive aspect is warranted by the basic rights the Convention affords to refugees, including the right to work and education and the right to freedom of movement and religion.

However, somewhere between the humanitarian ideal of restoring the legal person of the refugee and the actual practices of asylum, the system of refugee protection is falling apart (Chapter One). Haunted by the specter of the refugee who comes today and stays tomorrow, states have indisputable factored in the negative when it comes to protection. Favoring 'return home' as the durable solution to the problem, while virtually giving up on integration as a means to end the plight of refugees, states have invariably sought ways to limit their protection obligations to the prohibition of *refoulement*. Detaching *non-refoulement* from any positive aspect of protection irredeemably undresses refugee protection. At the same time, states increasingly seek to circumvent their obligations by employing non-arrival and non-admission policies. Efforts to prevent asylum seekers from reaching the territories of targeted host states seriously obstruct the individual's right to seek asylum.

This thesis tries to trace down the origins of this breakdown. It is not enough to point out the lack of political will on the part of states to comply with obligations they voluntarily accepted. The theoretical problem at issue is constituted by the hazy concept of asylum. Indeed, what presses the theoretical debate about refugee protection is that the international community appears to be in complete disarray

about the concept of asylum. As Goodwin-Gill and McAdam put the quandary: 'In regard to asylum … the argument for obligation fails, both on account of the vagueness of the institution and of the continuing reluctance of States formally to accept such obligation and to accord a right of asylum enforceable at the instance of the individual.'[1] Although the argument for obligation fails, the question of asylum should not, for that reason, be dodged.

In this thesis I approach the issue of asylum from a philosophical perspective. Two questions underlie this academic study. First, given what refugeeship amounts to, what is asylum? And, second why would we, as members of democratic polities, care? Through the looking glass of 'the right to have rights', as coined by Hannah Arendt, both questions interrelate. The right to have rights which is claimed at the behest of those who exist outside the pale of law, reflects the plight that befalls refugees and for which they seek international redress. The situation in which the right to have rights insists, therefore illuminates what, exactly, the refugee is claiming in claiming asylum. But the right to have rights is far from a solution to the problem. In fact, Arendt invoked the right to have rights to bring to awareness the complex relation between refugees and potential host states. Proceeding from the assumption that in modern democracies rights, equality and freedom are the outcome of the joint political action between the members of the polity, the dilemma is this: how can the refugee, who does not belong, claim a right to have rights? This lack of political reciprocity signals the unavoidable asymmetry between the refugee and the receiving polity. What makes matters so complex is that the asymmetry cannot be solved by legal formalism, nor be eased by universal principles of humanity. Hence the question: if a people determines and unites itself around a common interest, why would it care to protect refugees?

As said, the Refugee Convention responds to a situation that comes into being whenever people cross an international border out of fear of persecution. Likewise, the question of asylum is to be informed by a conceptual understanding of the calamity refugees are facing. This thesis therefore proceeds from an inquiry into the concept of the refugee (Chapter Two). At the time of drafting the 1951 Convention, refugees were perceived to constitute a class of unprotected persons. Intellectual debate further qualified this by identifying the refugee problem as a problem of *de facto* statelessness. The predicate *de facto* statelessness was meant to express that refugees are destitute of protection as a matter fact, whereas persons stateless *de jure* suffer from a legal lack of protection due to the absence of nationality. This thesis puts doubt on *de facto* statelessness as an adequate concept to identify the refugee dilemma. It is argued that the very concept of *de facto* statelessness holds the concept of asylum out of sight. The main objection formulated in this book against *de facto* statelessness is that it understands the lack of protection refugees are suffering as a brute fact. It thereby fails to see that this lack of protection is tantamount to the loss of an own place which is legally warranted. Taking the role and function of nationality in international law into account, it is argued that the refugee, who is driven outside the legal bonds of protection that connect him to a state, forfeits a legal place where he can enjoy and exercise his rights and freedoms. Indeed, on the understanding that law emplaces human beings in terms of rights

[1] Goodwin-Gill & McAdam 2007, p. 358.

and duties, the refugee loses his *abode*. That is, he loses the place where he abides by the law and where he is properly dwelling. One of the most important findings of this thesis is that the distinction between *de facto* and *de jure* statelessness, between refugees and stateless persons is not as trenchant as is currently believed (Chapter Two and Five). Through the looking glass of the right to have rights both the refugee and the stateless person share in the same fundamental dilemma: where do they have a right to live? On the understanding that rights and duties do not simply befall a human being but require the legal emplacement of the individual within an organized political community, the claim to asylum is cast as the claim to an own place which is legally warranted. Indeed, asylum not only refers to protection as is commonly assumed, but also to the place where protection is offered, which was the common understanding of asylum before the Twentieth Century. By taking the notion of place back in into the account of asylum, asylum comes into view as the *anticipated possibility* (hence not necessity) of becoming rooted again. The understanding of asylum this thesis provides aims to balance durable solutions to the plight of refugees, by bringing into view again the integration of refugees in host societies and deprive repatriation of its longstanding predominance.

This raises the second question of the thesis: why would we, as members of democratic polities, care to protect refugees and grant them asylum among ourselves? To answer this question I turn to contemporary interpretations of the right to have rights (Chapter Three). It will be argued that Seyla Benhabib's attempt to carve out a common moral ground between the 'rights of others' and the rights of states, is inconclusive. Within the theoretical framework of her agonistic cosmopolitanism, Bonnie Honig draws on proximity, targeting a presumed moral reciprocity between those who belong and those who do not belong. Though proximity remains much closer to the dilemma refugees and democracies face in facing each other, it fails to explain why a claim to asylum would register in a polity, if at all.

To pursue an answer to that question, the argument returns to the asymmetry as reflected by the right to have rights. Keeping in mind that the asymmetry derives from a basic insight in modern democracy, i.e. that those who rule and those who are being ruled are the same, the relevant question is: how to understand and make sense of the sovereign right of a people to determine it*self*? On close reading, popular sovereignty raises the question what it means for a people to exist as a self. To elaborate a theory of collective identity that aims at the self at issue in the sovereign right to self-determination, I turn to the work of Martin Heidegger (Chapter Four). To grasp selfhood-in-the-plural this thesis offers a reading of the existential exposition of Dasein (*Sein und Zeit*) from the perspective of the first person plural. From the viewpoint of selfhood sovereignty appears a people's concern for its own existence. Finitude (death) is the ultimate perspective of this concern. Indeed, what makes a people concerned for its own being is that its self is essentially elusive, incessantly slips away from the identifications and representations by means of which a people determines, exactly, itself. To be more specific: a people understands and determines itself by means of inclusion and exclusion. But the boundaries that are drawn, by virtue of which a people determines itself, are not grounded in who and what a people is. Boundaries, that is, are never fully legitimated by the plural self that rises forth from this act of

positioning boundaries. Hence the need of a people to refound itself time and again, and to draw its boundaries again and anew.

The upshot of the existential exposition of We-Dasein is that the self – which is the hallmark of sovereignty – is fundamentally lacking. To exist as a self means to be exposed to one's own absence. The arrival of the refugee, who has experienced the absence (death) of a We, exposes a people to its own radical contingency, its own not-being (Chapter Five). The relevant argument in this respect is not that finitude (death) mitigates the asymmetry between the refugee and the receiving polity ('we are all dying'), nor 'that we are all refugees.' The point is rather that the arrival of the refugee carries a very specific meaning for the targeted polity. For the refugee, who appears at the doorstep of the polity, is critical towards a people's concern in the most radical way. The refugee knows better than anyone else that the enjoyment of rights, duties and freedom require spatial limitation. Which, recall, is exactly why he claims asylum. The refugee does not, therefore, reproach the receiving polity for its original sin of drawing boundaries. But that boundaries need to be drawn to assign to each its due, does not justify these boundaries in terms of law. By exposing a people to its own radical contingency (making a people, indeed, feel *insecure*), the refugee calls into question the *right* a people claims to determine itself and, in the wake of that, the right to select and exclude non-members at its borders. If the refugee is critical towards a people's concern, it is because this concern is not grounded in the plural self, but rather in the slipping away of the people it*self*. Still otherwise, the self which, recall, is the hallmark of sovereignty, is not the ground of sovereignty. Rather, sovereignty is grounded in a fundamental lack of ground, which is precisely why sovereignty expresses the concern of a people for its own being. Grounded in a fundamental lack of ground, a people's concern for its own being is much more *de facto* than it is *de jure*.

The right to have rights attaches to those who have lost a legal place of their own and who, therefore, belong nowhere in this world. At the same time the right to have rights displays the unavoidable asymmetry between the refugee and the receiving polity. Therefore, the right to have rights reflects that the refugee is neither inside (hence the asymmetry) nor outside (he belongs nowhere). Still otherwise, upon his arrival the refugee cannot be immediately incorporated (he has *no right* to be here), nor can he be properly located outside (he has *no where* to go). Neither inside nor outside, the refugee does not, properly speaking, arrive at the borders of a state that close off an inside over against an outside. Rather, the refugee appears at the threshold, which is exactly the place where the inside and outside of a polity intertwine. Taking my cue from Agamben, it is argued that the threshold is the experience of being-within an outside, - which is exactly the ambiguous experience of being a plural self. Whenever the refugee arrives, it is never certain that he has a right to be here. But if he is approached with benevolence and in good faith, it is a people's own precarious being that attunes it to these moods of modesty. Indeed, benevolence and good faith take the refugee serious, while at the same time express a concern for a people's own uncertain and vulnerable being. The reception of refugees is as ambiguous as this. Malevolence, distrust and hostility, by contrast, fail a people's own finite existence. They turn the threshold into a frontier, erase a people's own ambiguous self and replace it with the hum-bug logic in which it is either 'us' or 'them' who are going to drown.

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I am in between the philosopher and the lawyer. Literally, my house in Tilburg is located midway between those of my supervisors, Bert van Roermund and Anton van Kalmthout. Although at times I was afraid to be crushed by the rigour of their respective disciplines, the geographic coincidence turned out to provide the perfect metaphor for a buffer zone.

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I dedicate this book to my son Roman, who likes to play by ordering the world around him. And to my daughter Halina, who playfully disrupts everything her brother has just brought to order.